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NATIVE COMMISSIONER
HEIDELBERG
12-2-1937
TRANSVAAL
NATURELLEKOMMISSARIS

UNION OF SOUTH AFRICA.

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SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(TRANSVAAL AND NATAL.)

1936.

AKADEMIESE INLIGTINGSDIENS
UNIVERSITEIT VAN SUID-AFRIKA
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SOUTH AFRICA

G.P.-S.719—1937—400.

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NATIVE APPEAL COURT.

NATAL AND TRANSVAAL DIVISION.

SELECTED DECISIONS.

CASE NO. 1.

MSHIYENI ZULU VS. VANDE MKWANYANA.

ESHOWE. 16th. January, 1936. Before B.W. Martin, President, C.A. Mack and J.T. Braatvedt, Members of Court (Natal and Transvaal).

NATIVE APPEAL CASES - Widower - Cohabitation with widow - Non-payment of lobolo - Property rights in offspring.

(In Zululand the omission to pay lobolo as compared with the right of a person to claim it, distinguished).

An appeal from the Court of Native Commissioner, Mtunzini.

Appellant's father cohabited with a widow. Two girls were born. No dowry was paid for the widow who by a previous marriage had a son, now Respondent, who states however that a "mqoliso" beast was slaughtered.

Appellant in a Chief's Court claimed from Respondent the property rights in the two girls and obtained judgment. Respondent, on an appeal to the Native Commissioner's Court obtained a judgment in his favour. Appellant appealed on the ground that there was a de facto marriage.

HELD: That notwithstanding the statement of the widow, that her intercourse with Appellant's father was adulterous, the fact that she lived with Appellant's father and bore two children at his kraal coupled with the slaughtering of a "mqoliso" beast, to mark a marriage ceremony is sufficient evidence to stamp the union as a regular one.

That the omission to pay lobolo has no important significance as long as the right to claim it exists and is not disputed. There is nothing to prevent the postponement of the payment of such lobolo until some future time.

N.B. - This custom coincides with that prevailing in British Bechuanaland among the Barolong Tribes.

Appeal upheld with costs and the judgment of the Chief's Court upheld. Appellant to have costs in the lower Court.

For Appellant: Mr. H.H. Kent of Messrs Shaw & Co., Eshowe.

For Respondent: Not represented.

(In this matter the Appeal Court drew attention to the necessity for Native Commissioners to observe the requirements of Rules 5, 6 and 7 of Native Chiefs' Civil Courts, Government Notice No. 2255 of 21.12.1928, as amended, when an appeal from a Chief's Court is heard).

MARTIN, P., delivering the judgment of the Court:

This case originated in the Court of the Native Chief

(Acting)...../

(Acting), Mcondo where the Appellant sued Respondent for the property rights in two girls named Nonjani and Nozibhele, half sister of the parties, and obtained a judgment in his favour. That judgment was taken in appeal to the Court of the Native Commissioner, Mtunzini, where the appeal was upheld and the judgment of the Native Chief was altered to one for Defendant (now Respondent) with costs. The present appeal is against the judgment of the Native Commissioner, the grounds of appeal being:

(1)

That the Native Commissioner's judgment is against the weight of evidence and is bad in law, and

(2)

That the Native Commissioner should on the evidence adduced have found that there was a de facto marriage betweer the late Silevu and Nontubela thereby legitimising the offspring of the union.

Although the points have not been urged as grounds of appeal this Court feels impelled, in the interests of regularity of procedure, to take judicial cognizance of the absence of any reference in the written record of this case to the observance of the requirements of Rules 5, 6 and 7 of the Rules of Native Chiefs' Civil Courts.

Rule 5 provides that the dissatisfied party shall notify his Chief or his representative of his intention to appeal, but there is nothing in this record to indicate that this was actually done. There is nothing to show that the Chief or his representative ever attended at the Native Commissioner's Court in connection with this case and the only evidence to be found on the record that the case actually and in fact came before the Chief in the first instance is the allegation to that effect which is contained in the summons and the use of the words "Appellant" and "Respondent" in the notes of evidence. It is presumed that the judgment in this matter was duly recorded in the Native Commissioner's records in terms of Rule 9, in which case it is probable that the fact that notice of appeal was given was recorded therein. But there should be some evidence in the record of subsequent proceedings to indicate that the requirements of Rule 5 have been observed.

Rule 6 lays down that the Native Commissioner with whom an appeal is lodged shall record the information of the Appellant in regard to his claim before the Chief and the judgment thereon and shall thereupon fix a day for the hearing of the appeal and notify the Appellant and the Respondent accordingly.

Rule 7 directs that the Chief on receiving any notice of appeal shall immediately report to the Native Commissioner particulars of the claim lodged with him , the reply of the judgment debtor, if any, and his judgment or order thereupon, and the reasons therefor which shall be recorded.

There is nothing in the record to show that the requirements of Rules 6 and 7 were observed. The object of these Rules is obvious, viz: to have placed on record the exact issues tried before the Chief, his judgment thereon, and his reasons therefor, and (possibly) the Appellant's grounds for appealing against the judgment. (Vide Woti

Dhlamini vs. Joseph Dhlamini (1930) N.A.C. (N. & T.).

The proper method of compliance with the requirements of Rule 7 is for the Chief concerned to supply his reasons in writing where he is able to do so or to state them to the Native Commissioner who should record them, and in either case file them of record at the opening of the proceedings in his Court. In practice, however, the Chief or his representative attends at the hearing of the appeal and gives his views and reasons for judgment and this would constitute a sufficient compliance with the rule under discussion.

Failure to observe the requirements of the Rules referred to is an irregularity which might conceivably result in the proceedings being quashed as void ab origine but as such non-observance has not been urged as a ground of appeal in this instance this Court must regard the right to do so to have been waived and proceed to discuss the appeal on the merits of the case.

The facts of the case as revealed by the evidence are as follows:-

Appellant is the son and heir of the late Silevu Zulu. His mother died in his infancy and he was thereafter brought up by his cousin Muziwokufa.

After his wife's death Silevu cohabited with a woman named Notugela who was the widow of one Mndeni Mkwanyana and as a result of such cohabitation the two girls in dispute were born. This woman had previously borne four children by Mndeni one of whom was the Respondent, who is his late father's heir.

Appellant claims, in his capacity of heir to his late father, the custody of the girls Nonjani and Nozibhele on the ground that their mother became his father's wife in a customary union.

Respondent denies that any such union took place and contends that the girls were the result of promiscuous intercourse between his mother and Appellant's father and are therefore members of his mother's house of which he is the heir.

The point to be decided is whether or not the association between Appellant's father and Respondent's mother can be regarded as regular or otherwise.

The Chief decided that the union was a regular one but the Native Commissioner has held otherwise.

It is admitted by both parties that no lobolo was paid for the woman by Silevu. Appellant was only a small boy when the cohabitation between his father and Respondent's mother commenced and he could not have been cognizant of the happenings of that time. He explains that the omission to pay lobolo was due to the fact that there was no one to receive it, the Respondent being himself a child at the time. He says, however, that a "Koyisa" (mqoliso) beast was slaughtered. He declares further that Respondent's mother lived with the children, including the Respondent, in his father's kraal and is

still...../

still in residence there. Appellant is supported by his cousin Muziwogufa (in whose kraal he grew up after his father's death and where he still lives), and his uncle Mdhlekezi (whose mother cared for Appellant after his mother's death).

The Respondent admits that his mother lived with Silevu at the latter's kraal after his father's death and that the girls in dispute were born there. He denies any marriage, however, and says that Silevu told him that the two girls were his as he (Silevu) did not want to pay lobolo for their mother who was an aged person.

Although the Respondent made no mention of his mother's residence in any kraal other than that of Silevu after her first husband's death his mother, Notugela, declares that she first lived at the home of her own people at Amatikulu, then at the kraal of one Jubane, and finally established her own hut in the ward of Chief Siposo in Mtunzini District in which she declared she was still living at the date of the hearing of this case. She declares that she never lived in the kraal of Silevu, that Silevu used to visit her at her own hut and that as a result of those visits the girls in dispute were born. Incidentally, those girls are now full grown and one of them is a mother. She denies the slaughtering of an "Mqoliso" beast and declares that her intercourse with Silevu was adulterous. Her witness and cousin Siqwayo, an ex-Native Constable in the South African Police admits, however, that when on a certain occasion he came home on leave, he found Notugela living in the kraal of Silevu with her children (including Nonjani and Nozibhele) but he declares that she afterwards left the kraal and set up an establishment of her own.

On this evidence and on the probabilities this Court must hold that Appellant's story is the correct one and that the relationship that existed between Silevu and Notugela was that of man and wife and that the issue of such union is legitimate.

It is a well established rule that in Zululand far less formality attaches to the marriage of widows and divorced women than is the case with women marrying for the first time, especially in respect of the essentials of a valid marriage as defined by the Code. The omission to pay lobolo has no important significance as long as the right to claim it exists and is not disputed. Whether or not lobolo is to be paid depends largely on the child bearing capacity of the women concerned and there is nothing to prevent the postponement of the payment of such lobolo until some future time. The circumstances in this case indicate, notwithstanding the denials of Notugela, who is obviously now anxious to benefit her own son, the Respondent, that a de facto marriage between her and Silevu was intended and consummated. There is a strong presumption which has not been rebutted, that the union was sanctioned by the responsible members of the family of the late Mndeni who appear to have contented themselves with holding over their claim for lobolo until such time as the Respondent, who was then a child, could himself receive it.

The appeal is upheld with costs and the judgment

of...../

of the Native Commissioner altered to one declaring Appellant to be entitled to the property rights in and to his half sisters Nonjane and Nozibhele. Appellant to have costs in the lower Court.

CASE NO. 2.

SIFO NGOBESE VS. STEPHEN ZIKALI.

ESHOWE. 17th. January, 1936. Before B.W. Martin, President, C.A. Mackn and J.T. Braatvedt, Members of Court (Natal and Transvaal).

NATIVE APPEAL CASES - Adultery: Proof of - Married woman - Presumption of regular union - Quantum of evidence.

An appeal from the Court of Native Commissioner, Mtunzini.

Respondent obtained £10 damages in a Chief's Court. Appellant having failed in a Native Commissioner's Court, appealed. For Appellant it was urged (1) that the onus was on Respondent (Plaintiff in the Chief's Court) to shew that a legal union subsisted, and (2) that the evidence was insufficient to prove conclusively that adultery was committed.

HELD: That, as Respondent had lived with the woman concerned for a very long time, that some cattle at least were paid as lobolo, that a "mqoliso" beast was slaughtered and that children were born to the parties, the union is presumed to be regular.

That as Respondent caught Appellant in the act of committing adultery coupled with the flight of the guilty parties and the admission by the woman in the Native Commissioner's Court (after the trial in the Chief's Court) that she was living with Appellant, is conclusive evidence of adultery.

Appeal dismissed with costs.

For Appellant: Mr. G.S. Wynne of Messrs Wynne & Wynne, Durban.

For Respondent: Not represented.

MARTIN, P., delivering the judgment of the Court:

This is an appeal against the judgment of the Assistant Native Commissioner, Mtunzini, in an appeal brought before that Court against the judgment of Chief Somshoko in a case in which Respondent was Plaintiff and claimed from Appellant the sum of £20 as damages in respect of an alleged act of adultery by the latter with Respondent's wife Mbambise, and in which the Chief awarded damages in the sum of £10 to Respondent.

The Native Commissioner dismissed the appeal with costs, thereby confirming the Chief's judgment.

Appeal has now been brought against the judgment on the following grounds, viz:-

(1)...../

(1)

The judgment is against the weight of evidence and the law arising thereout.

(2)

The onus was upon the Plaintiff (now Respondent) to show a legal marriage, and that adultery was committed by Appellant with knowledge of such marriage, and Plaintiff (now Respondent) has failed to discharge such onus.

(3)

It was shown that the woman Mbambise and Defendant (now Appellant) knew of no marriage.

(4)

Wherefore Appellant should have been absolved from the instance with costs.

The evidence clearly established that the woman Mbambise lived with Respondent in the relationship of man and wife for many years commencing from somewhere about the time of the Zulu Rebellion of 1906, that at least four head of lobolo cattle were paid for her and the usual "qolisa" beast was slaughtered, that a ceremony of marriage was observed, and that two children were born as a result of such cohabitation. The union was not registered officially, however, but as the registration of customary unions was not enforced in Zululand in those days the omission to register has no significance in this case. The presumption of the regularity of the union is, consequently, almost conclusive and the Native Commissioner was correct in holding that there was a binding and legal union between the Respondent and Mbambise.

It is also clear that Mbambise committed adultery with Appellant during December, 1934. Respondent has deposed to discovering her in the act, and the woman does not deny the allegation. This discovery was followed by the flight of both the guilty parties and the woman admits that she is living with her paramour at the present time.

Counsel's argument that the allegation of adultery rested upon hearsay evidence is disposed of by a reference to the original record in which Respondent is recorded to have stated definitely "I found Defendant committing adultery with my wife." This factor, supported as it is by the flight of the guilty parties immediately after the incident, and the subsequent admitted cohabitation is, in the opinion of this Court, conclusive evidence of adultery.

As regards the contention that there is no proof that Appellant had knowledge of the fact that the woman was married, the record shows that Respondent and his wife Mbambise had lived together for a period of nearly thirty years, and had had children. The inference must be drawn, therefore, from these circumstances, that the Appellant must have known of her married state. The onus of disproving such knowledge was, therefore, upon him;

this...../

this he has failed to discharge.

The appeal is dismissed with costs and the judgment of the lower Court confirmed.

CASE NO. 3.

NDAYI MYEZA VS. MZNYWA MYEZA.

DURBAN. 23rd. January, 1936. Before B.W. Martin, President, C.A. Mack and J.T. Braatvedt, Members of Court (Natal and Transvaal).

NATIVE APPEAL CASES - Res Judicata - Estoppel.

An appeal from Court of Native Commissioner, Pinetown.

Appellant and Respondent are full brothers of the Indhlunkulu section of their late father's kraal. Respondent is general heir. In 1910 Appellant sued Respondent in a Chief's Court for the lobolo of his sister Ntandose of the Ikohlo section of the kraal alleging that his late father allocated the dowry of that woman to him. He failed and in an appeal to a Native Commissioner's Court, he was unsuccessful. In 1934, he again sued Respondent. The basis of his claim was similar to that in 1910. He was unsuccessful in both the previously named Courts.

In 1935 he sued Respondent and based his claim on a promise by Respondent in 1911, to allocate the dowry for Ntandose to him.

The claim was dismissed by the Native Commissioner. He appealed to this Court.

HELD: That in view of the 1910 and 1934 judgments, Appellant cannot overcome adverse decisions of the past by changing the basis of his claim to a ground which was available to him when he instituted the 1934 action. The appeal is dismissed with costs.

For Appellant: Advocate L.R. Caney, Durban.

For Respondent: Mr. E.P. Fowle, Durban.

MARTIN, P. (delivering the judgment of the Court):

This is an appeal against the judgment of the Native Commissioner, Pinetown, in whose Court the Appellant was Plaintiff and claimed from Respondent the sum of £3 and two goats representing one beast received by the latter as lobolo for his half sister Ntandose of the Ikohlo section of their late father's kraal. Alternatively, the claim was for the delivery of the two goats and payment of the sum of £3, or in lieu of such payment, delivery of one beast or payment of £5 its value, on the ground that Appellant is entitled according to Native custom and law to receive the lobolo of one of the daughters of his late father by reason of the payment to his said father during the latter's lifetime of his (Appellant's) earnings.

The...../

The Native Commissioner held that the case was res judicata and dismissed the claim with costs and it is against that decision appeal is brought.

The parties are the sons of the lateZiyagcagca Myeza who died before the advent of Rinderpest in Natal (1897). They are full brothers, of the Indhlunkulu section of their father's kraal, Respondent being his father's general heir.

It is common cause that Appellant left the kraal of his father soon after the latter's death as a result of a quarrel with Respondent and that Ntandose accompanied him.

It is clear that since their separation there has been a considerable amount of litigation concerning the property rights in Ntandose. During 1910 Respondent sued Appellant before Native Chief Ndunge claiming the replacement of one of five goats received by Appellant from one Mxetshulwa as damages for the seduction of Ntandose, which goat had been slaughtered without the consent of Respondent. The Chief's judgment went in favour of Respondent and included a declaration that Appellant had no claim to the property rights in Ntandose. An appeal against that judgment was unsuccessful.

On the 15th. October, 1934, Respondent brought an action against one Nephtali Msomi (referred to in the evidence as the husband of Ntandose) in which he claimed the custody of the three minor children born to Ntandose by Nephtali. The Respondent was granted custody of the children and Naphtali was ordered to pay costs.

Subsequently, on the 29th. October, 1934, Appellant brought an action against Respondent before Chief Mgijimi in which he claimed the property rights in Ntandose, basing his claim on an alleged allocation of that woman to him by his late father in recognition of his services in connection with the control and care of the Ikohlo section of his father's establishment. Again the judgment was against the Appellant and the case came in appeal before the Native Commissioner, Pinetown, on the 3rd. December, 1934. On that date the appeal was withdrawn it being admitted that the case was "res judicata."

The position is, therefore, that on two separate occasions, in cases between the Appellant and Respondent, it has been declared by competent tribunals that Appellant has no claim in and to the property rights in Ntandose. In another case, viz., the one between Respondent and Ntandose's husband Nephtali, a similar declaration was, in effect, made. None of those judgments have been upset or varied on appeal and they still subsist at the present time.

It is true that the claim brought by Appellant in October, 1934, differs as regards the basis upon which it is founded from that now under discussion. In the first mentioned case the claim was based on an alleged allocation of the woman Ntandose to Appellant by his father Ziyagcagca during the latter's lifetime. In the present case (24 years after the first case) the claim is based on alleged gift of the same woman to Appellant by Respondent during 1911, following the successful assertion of Respondent's right to that girl in the case heard in 1910. It is difficult to understand why, if the gift now relied upon was in fact made, the

Appellant based the claim made by him in October, 1934, on the allocation made by his father during the latter's lifetime instead of on the gift by Respondent in 1911.

It is obvious that the present case is an attempt by Appellant to overcome the adverse decisions of the past by changing the basis of his claim to a ground which was available to him when he instituted his action in October 1934. Having chosen to rely on the allocation made by his father prior to 1897 he cannot now recover under the guise of an alleged gift made in 1911.

The finding of the Native Commissioner is confirmed and the appeal dismissed with costs.

CASE NO. 4.

HARRY OGLE VS. MINA NGUBO D/A.

PIETERMARITZBURG. 27th. January, 1936. Before B.W. Martin, President, C.A. Mack and J.T. Braatvedt, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Kraalhead responsibility - Delicts of kraal inmates - Natal Native Code, Section 141.

An appeal from the Court of Native Commissioner, Ixopo.

Appellant, a kraalhead and chief in the Ixopo District lent his wagon to a married son, who entered into a contract with a third party for the cartage of poles from a plantation. The kraalhead was not a party to the contract nor did he derive any benefit therefrom. The wagon, which was in charge of two Native servants of Appellant's son, not related to him nor to Appellant nor residing at Appellant's kraal, collided with Respondent on a public road and caused her severe injury.

The Native Commissioner awarded Respondent £100 damages.

HELD: That the responsibility of a kraalhead as laid down in Section 141 of the Code, cannot be extended to the delicts of the servants of a married son when such servants are engaged in a contract to which the kraalhead is not a party and out of which he derives no benefit. Appeal upheld with costs and the judgment of Native Commissioner altered to one for Defendant with costs.

For Appellant: Mr. P.A. Donnelly, Ixopo.

For Respondent: Mr. J.B. Farrer, Ixopo.

MARTIN, P. (delivering the judgment of the Court):

This is an appeal against the judgment of the Acting Assistant Native Commissioner, Ixopo.

Respondent is an unmarried Native female and, with the assistance of her father and guardian, seeks to recover from Appellant damages for an injury sustained by her when she was run over on a public road by a wagon owned by Appellant.

Appellant...../

Appellant is a kraal head and Chief over a tribe of Natives in the Ixopo District. He is the owner of the wagon that was the cause of the injury to Respondent but it is admitted (and this fact was amply borne out by the evidence) that at the time of the accident the vehicle was not employed by or on behalf of Appellant in the work of his kraal, but had been borrowed by his married son to carry out a contract entered into by the latter for the cartage of wattle poles from a plantation to a customer.

The accident to Respondent occurred some three or four miles distant from Appellant's kraal on the public road. The wagon was in the charge of two Native servants of Appellant's son who are not related to him or to Appellant nor do they reside in Appellant's kraal. Neither the Appellant nor his married son were present or any where near the scene of the accident at the time it happened.

It is clear that the Appellant's son had borrowed his father's wagon for the purpose of carrying out a contract which he, as a married man and a major in law, was competent to enter into. It is also clear that Appellant was not a party to that contract either directly or by implication and that he would not derive any pecuniary benefit thereby arising out of the use of his wagon.

The Respondent's summons is in the following terms:-

"For the sum of £190 being for and as damages "sustained by the said Mina Ngubo by reason of her having "been injured by Defendant's wagon during or about the "months of March or April, 1934, through the negligence of "Defendant's servants then in charge of the said wagon. As "a result of the said injury Plaintiff has been confined to "Hospital for the past three months and is still so con- "fined."

It will be observed that the claim is based on the alleged negligence of Appellant's servants, and Respondent's Attorney (Mr. Farrer) at the opening of his address, candidly admitted that his summons was issued against Appellant in the belief that those in charge of the wagon at the time of the accident were in fact the employees of Appellant. It was only as the case progressed that it became apparent that the position was as detailed supra.

Counsel for Respondent contended, however, that even in the circumstances stated, the Appellant, being the head of the kraal in which his major son resides, is by virtue of the terms of Section 141 (a) of the Natal Code of Native Law, liable for the delicts of the latter's servants.

The section quoted reads as follows:

"141(1). A guardian is liable in respect of delicts com- "mitted by his ward while in residence at the same kraal "as himself.

"(2). Notwithstanding any thing in Section 27 or in "any other provision of the Code -

"(a) A father is liable in respect of delicts commit-

ted...../

"committed by his children while in residence at the same "kraal as himself;

"(b) A kraal head is liable in respect of delicts "committed by any unmarried inmate of his kraal while in "residence at the kraal."

We are not able to agree with the contentions of Respondent's Counsel. The section quoted throws a very heavy responsibility on a kraal head and if it is construed strictly it makes him liable even for the consequences of the delicts of his married sons, provided they are in residence in the same kraal as himself.

Such responsibility cannot, in our opinion, be extended to the delicts of the servants of a married son when they are engaged in a contract to which the kraal head is not a party and out of which he derives no benefit whatsoever, pecuniary or otherwise.

The appeal is sustained with costs and the judgment of the Native Commissioner altered to one for Defendant with costs.

CASE NO. 5.

APPLICATION: JOB KAMBULE AND OTHERS.

PIETERMARITZBURG. 29th. January, 1936. Before B.W. Martin, President, C.A. Mack and J.T. Braatvedt, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Application for extension of time to note appeal - Government Notice No. 2254/1928.

An application for leave to note appeal from Court of Native Commissioner, Klip River.

Applicants who were Defendants in an action in the Native Commissioner's Court were represented by Counsel. Judgment was given against them and an appeal on their behalf was noted two days late. It was averred by them that the reason for the late noting of appeal was due, inter alia, to the confusion brought about by conflicting decisions of this Court on the question of the computation of the period allowed by the Rules for noting an appeal.

HELD: That although in the case Elias Motsoeneng vs. Paul Thomas Tusi, 1933 N.A.C. (N. & T.) it was laid that Sundays and Public Holidays must be excluded when calculating the period of twenty-one days allowed for noting an appeal, that decision was overruled in Timothy Kanyile vs. Nonjinayisi, 1933 N.A.C. (N. & T.) page 36, in which it was decided that Sundays and Public Holidays must be calculated except when the last day of such period falls on a Sunday or Public Holiday.

That the latter case was published in Prentice-Hall reports and all legal practitioners should have become aware of the altered position.

Application refused with costs on the ground that no just cause was shewn in this case.

For...../

For Applicants: Mr. H.B. Cawood, Ladysmith.

For Respondent: Mr. J. Levin, Ladysmith.

N.B. - Vide, Silo Mdhlalose vs. Matshwelana Nzuza, 1933 N.A.C. (N. & T.) 31 in regard to "just cause" within the meaning of Rule 6 of Government Notice No. 2254/1928.

MARTIN, P. (delivering the judgment of the Court):

This is an application for condonation of a failure to note an appeal against the judgment of the Assistant Native Commissioner, Klip Rover, at Ladysmith, within the time specified in Rule 6 of the Rules of Native Commissioners' Courts.

The reasons for delay are stated to be, firstly, the difficulty experienced in arranging for a meeting of the Committee of the Syndicate represented by the Appellants for the purpose of collecting funds for the security required by the Rules of Court and Counsel's fees and, secondly, the confusion brought about by conflicting judgments of this Court on the question of the computation of the period allowed by the Rules for the noting of an appeal.

It is true that there has been some confusion on the last mentioned point. In the case Elias Motsoeneng vs. Paul Thomas Tusi 1933 N.A.C. (N. & T.) it was laid down that Sundays and Public Holidays must be excluded when calculating the period of twenty one days allowed for the noting of an appeal. But that decision was overruled by the same Court in the case Timothy Kanyile vs. Nonjinayisi 1933 N.A.C. (N. & T.) p.36 in which it was decided that Sundays and Public Holidays must be calculated except when the last day of such period falls on a Sunday or Public Holiday.

This last quoted decision was published in Prentice-Hall reports and all legal practitioners should have become aware of the altered position of things.

The principles by which this Court is guided in matters of this nature and what contitutes "good cause" within the meaning of Rule 6 were fully discussed in the case Silo Mdhlalose vs. Matshwelana Nzuza 1933 N.A.C. (N. & T.) 31, and we see no reason to depart from those principles in this case.

On the ground that no just cause obtains in this case the application for condonation is refused with costs.

CASE NO. 6. 1944 (T & N) 13.

MAGUNYA NYAWO VS. TIMOTHY NYAWO.

PIETERMARITZBURG. 30th. January, 1936. Before B.W. Martin, President, C.A. Mack and J.T. Braatvedt, Members of Court (Natal and Transvaal).

NATIVE APPEAL CASES - Zulu custom - Marriage - Prohibited degrees of relationship - Section 58 of Natal Native Code.

An...../

An appeal from the Court of Native Commissioner, Louwsburg (Ngotshe).

Respondent who seduced Appellant's dauther is related to her in the ninth degree. Appellant sued Respondent for damages for seduction etc. Respondent pleaded that he is agreeable to marry the girl. Appellant withholds his consent. Respondent counterclaimed under Section 60 of the Natal Native Code for an order authorising the celebration of the marriage.

The Native Commissioner who decided in Respondent's favour held that to prohibit the union would be contrary to public policy and natural justice as contemplated by Section 11 of Act No. 38 of 1927 (Native Administration Act). On appeal to this Court, -

HELD: That from time immemorial sexual intercourse between persons of the Zulu race who are related to each other by consanguinity, affinity or otherwise, however remote the relationship might be, has been illegal under customary law. That this custom is still alive and followed by the majority of the Zulu people.

Appeal upheld with costs and the case is remitted to the Native Commissioner for trial.

For Appellant: Mr. M.W. Bennett, Vryheid.

For Respondent: Advocate J.B. Macaulay instructed by Mr. K.W. Wright, Vryheid.

MARTIN, P. (delivering the judgment of the Court):

This case comes in appeal from the Court of the Native Commissioner, Ngotshe, at Louwsburg, in which the Appellant was the Plaintiff and sued the Respondent for £40 as and for damages by reason of the seduction by Respondent of the Appellant's daughter, Ntombiyelanga, resulting in the birth of two children, and £25 as and for damages for defamation of (or insult to) Appellant's good name by reason of such sexual intercourse having taken place between cousins.

The seduction of Appellant's daughter by Respondent is admitted. Respondent declares that he is willing to marry the girl and pay full lobolo for her, but Appellant unreasonably withholds consent to the marriage. He contends that although he and the girl bear the same surname or "isibongo" they are not related to each other, and he counterclaims under Section 60 of the Natal Code of Native Law for an order authorising the celebration of his marriage.

The Appellant filed a family tree showing what he claims is the relationship existing between Respondent and his daughter. If the particulars given in that tree are correct the parties are the direct descendants of one Mshokwapatwa Nyawo and the Respondent and Appellant's daughter are cousins in the ninth degree.

Respondent denies the correctness of the family tree and says that apart from the similarity of surname he and Appellant's daughter are not related to each other.

Owing to the prohibitive cost of proving relation-

ship...../

relationship it was agreed by the parties that the question as to whether or not customary unions between Natives who are related to each other, however remotely, are prohibited, should be decided as a preliminary to any further enquiry.

The Native Commissioner has answered the question in the negative, holding that to prohibit such unions would be contrary to public policy and natural justice as contemplated by Section 11 of Act 38 of 1927. It is against that decision that this appeal has been brought.

It is clear that at Common Law the parties concerned would be ffee to marry each other and their intercourse could not be regarded as incestuous. They are Zulus, however, and this case must be judged according to Zulu customary law, provided, of course, that such law is not opposed to the principles of public policy or natural justice, which we hold is not the case.

The Natal Code of Native Law is silent on the question of prohibited degrees of relationship in so far as customary unions between Natives are concerned. Section 58 provides as follows:

"A customary union is not prohibited between:

"(a) A man and his wife's sister; or

"(b) A widow or divorced woman and her late husband's brother."

It is a historical fact that from time immemorial sexual intercourse between persons of the Zulu race who are related to each other either by consanguinity, affinity, or otherwise, however remote the relationship might be, has been illegal under Customary Law. Such intercourse was, and still is, regarded as incestuous, repulsive and abhorrent by the vast majority of the Zulu people. When the transgressors against the moral code were persons closely related to each other by blood they were almost invariably punished by death in olden times. In other cases the punishment took the form of banishment or social ostracism. In no case were the guilty parties permitted to mary each other and no self-respecting Zulu would contemplate the union of his offspring with another who was related to him or her in any known degree.

It is true that even in the days of the autocratic rule of the Zulu Kings there was a tendency on the part of some of the people to disregard the taboo against sexual intercourse between those who were related to each other. This may have been, and probably was, due to the difficulty in finding mates who were outside the prohibited degree of relationship. Tradition tells us that this state of affairs prevailed in the days of Zulu, the original King and founder of the Zulu nation. That potentate, who was evidently a very wife and understanding individual, realised that sexual intercourse between relatives, if allowed to continue, would eventually lead to the degeneration of his people. Being at the same time more human than his successors proved to be he was loath to put an end to the transgressors, but some way out of the difficulty had to be found. He consequently, so it is said, called all his people together and called upon those who were living together in incest to explain themselves. Their reply was "Ndabezita, siya zi Biyela" (Your Majesty,

we...../

we are ringing ourselves in" or, in other words, "we are keeping our women to ourselves"). The King thereupon replied "Seni nga bakwa Biyela" (You are now Biyela's), thereby creating a new clan or "isibongo" with whom other members of the Zulu tribe could intermarry. Father Bryant, in his book "Olden Times in Zululand and Natal", gives a different explanation of the origin of the Biyela clan name but there is reason to believe that the one given above is authentic.

Another tradition bearing on the same point attaches to the Zulu clan which now bears the surname or "isibongo" "Magwaza." It is mentioned by Bryant at page 127 of his book, supra, who relates that Makedama, the Chief of the Langeni (or Mhlongo) clan had taken to wife a technical 'sister', that is, a child of his own Langeni clan, though distantly related, by name Sidade, daughter of Mazwana. In order to correct the irregularity and to legitimise the union it was decreed that the family of Mazwana should thereafter bear the surname "Magwaza" because the Chief had 'gwaza'd (stabbed) or 'criminally assaulted' one of their daughters.

These instances are mentioned to support the view that even from the earliest times marriage between those who were related to each other, however remotely, has been illegal amongst the Zulu people. They also serve to show that whenever expediency demanded that some relaxation of the strict moral code was necessary in olden times such relief was afforded by a special decree of the King of that time, who enjoyed autocratic powers.

In effect this Court is now asked to follow the example of the old Zulu Kings by declaring it to be permissible for persons of the same clan or family to intermarry, thereby condoning and approving of acts which are held in supreme contempt by all self-respecting and well regulated Zulu communities. It is not considered that this is our function. It may happen that at some future time circumstances may demand some relaxation of the restrictive rules which presently obtain amongst the Zulu people. When that time arrives the question will have to be decided by the Legislature of the country. The prohibition under discussion is a wise one and, in the physical and moral interests of the Native races, it should be retained as long as possible.

For the reasons stated, this Court is unable to support the finding of the Native Commissioner and the appeal is upheld with costs and the case remitted to the Native Commissioner for trial.

CASE NO. 7. 1937 (T & N) 34.

SIAPARA MOIMA AND MIFA MOIMA VS. AFRIKA MOIMA.

PRETORIA. 9th. March, 1936. Before Martin, President, Fynn and Sweeney, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Bapedi custom - Status of widows - Succession - Heirship to Native Estate - Government Notice No. 1664/1929.

An...../

An appeal from the Court of Assistant Native Commissioner, Rayton (Premier Mine), in proceedings to determine who is the heir in a Native Estate (Government Notice No. 1664/1929).

The Assistant Native Commissioner came to the conclusion that Respondent is the heir in the Estate of the late Patela Moima.

Patela Moima during his lifetime consorted with five women in the following order:-

(1) Kokodi who bore no male issue to him;
(2) Mampubwana, Respondent's mother;
(3) Maburutjane;
(4) Mahlodi, Appellant Siapara's mother; and
(5) Matlaji, Appellant Mifa's mother.

Appellants claim that thir mothers were taken to wife by their father and placed in the house of his senior wife, Kokodi, for the purpose of providing an heir to that house and that Siapara is the general heir of his father and entitled to inherit the landed property.

It was contended by Respondent:

(1) That the woman Kokodi was, prior to her association with Patela Moima, the widow of one Makiti Matladi and that according to the customary law of the Bapedi tribe of the Northern Transvaal, it was not competent for her to enter into a legal union with any person outside the family of her deceased husband i.e., that she cannot be regarded as the lawful wife of the late Patela Moima.

(2) That as the women Mahlodi and Matlaji were lobolad with cattle belonging to the estate of Kokodi's first husband, Makiti, neither they nor their offspring belong to the establishment of Patela Moim but to that of Makiti Matladi and that neither of Appellants can be regarded as sons of Patela for the purpose of succession.

It was necessary to decide what was the status of the woman Kokodi according to Bapedi custom when she became associated with Patela Moima. The record was returned to the Assistant Native Commissioner and additional evidence obtained.

The Native assessors stated that according to Bapedi custom a widow may never remarry; she must remain in her deceased husband's "lapa". She can only be taken over by relative of her deceased husband for raising seed to her deceased husband's establishment.

HELD, on the facts, that Kokodi was the widow of the late Makiti Matladi and that she could not enter into a legal union with Patela Moima who could be regarded only as a seed raiser to the house of the late Makiti Matladi and that as Appellants' mothers were acquired with cattle belonging to Makiti, Appellants cannot be regarded as heirs to Patela Moima.

That as the legality of the union between Patela Moima and the woman Mampubwana (mother of Respondent and the

senior...../

senior of Patela Moima's lawfully married wives) was not challenged, Respondent, who is her eldest son, must be regarded as Patela's heir.

Appeal dismissed with costs on the higher scale and the finding of the Assistant Native Commissioner confirmed.

For Appellants: Mr. P.J. Hart of Messrs Stegmann, Costhuizen & Jackson, Pretoria.

For Respondent: Mr. M. Goldberg of Bronkhorstspruit.

N.B. - It is interesting to note that the customary law of the "Bapedi" tribe in regard to the position of widows is, seemingly, as laid down in Deuteronomy, Chapter 25, Verse 5.

MARTIN, P., delivering the judgment of the Court:

This is an appeal against the finding of the Assistant Native Commissioner of the Rayton Sub-District of the District of Pretoria in proceedings held in terms of Section 3(3) of the Regulations framed under the provisions of Sub-section (10) of Section 23 of the Native Administration Act, 1927, in Government Notice No. 1664/1929.

The question at issue is the heirship in the Estate of the late Patela Moima and the right to inherit the property therein, particularly in regard to a five-thirty-sixth part of the farm Witpenskloof, No. 563 in extent 3274 morgen, 545 square roods.

The rival claimants are Afrika Motlurwa Moima (Respondent) on the one hand and Siapara Moima and Mita Moima (Appellants) on the other hand.

The Respondent claims to be the son of Mampubwana, his father's first lawful wife taken in accordance with Bapedi custom (of which tribe the parties are members).

The Appellants respectively claim that they are the sons of two women Mahlodi and Matlaji who were taken to wife by their father and placed in the house of his senior wife Kokodi for the purpose of providing an heir to that house, Kokodi not having borne male issue, and that Siapara is the general heir of his father and as such is entitled to inherit the landed property described above.

The Native Commissioner found in favour of Respondent and declared that he is entitled to receive transfer of the land in question.

It is clear that the late Patela Moima consorted with five (5) women during his lifetime who were taken in the order named, viz:-

(1) Kokodi who bore no male issue to him;

(2) Mampubwana, the mother of Respondent;

(3) Maburutjane,

(4) Mahlodi, the mother of the Appellant Siapara; and

(5) Matlaji, the mother of Appellant Mita.

It...../

It is contended by Respondent that Kokodi was, prior to her association with his father, the widow of one Makiti Matladi and that it was not competent for her under the law of the Bapedi, to enter into a legal union with any person outside the family of her deceased husband and that consequently she cannot be regarded as the lawful wife of the late Patela Moima. It was contended further that the women Mahlodi and Matlaji, (the respective mothers of the Appellants), having been lobolad with cattle belonging to the estate of Kokodi's first husband, which is indisputably the case, neither they nor their offspring belong to the establishment of Patela Moima and that consequently neither of the Appellants can be regarded as sons of the deceased Patela for the purposes of succession.

It is clear also that prior to her cohabitation with Patela the woman Kokodi lived with and bore four children by Makiti Matladi and that the mothers of the respective Appellants were subsequently lobolad with cattle derived as lobolo on the marriage of the daughters of that union.

It therefore became necessary, as a preliminary, for this Court to decide on the true status of Kokodi at the time she became associated with the father of the claimants. As it was not possible to do this on the evidence before the Court at the last date of hearing the matter was referred back to the Native Commissioner for the purpose of calling evidence on that point. The additional evidence is now before the Court.

In addition to the procedure referred to supra, the Court deemed it desirable to call to its assistance, in an advisory capacity, two Native Assessors in the persons of Chief Matude Mphahlele and Nkupu Maredi of the Bapedi tribe whose advice was sought in two main points, viz:-

(1) The capacity of a Bapedi widow to remarry; and

(2) What formalities, if any, must be observed on the occasion of an ordinary marriage under Bapedi custom?

The advice of the Assessors was, briefly, as follows:-

(1) A Bapedi widow may never remarry.

(2) There must be some ceremony when a marriage takes place including the payment of lobolo, the sacrifice of a beast etc., etc. Where there are no cattle available at the time of marriage, the payment of lobolo may be postponed to some future time, usually until a daughter of the union marries and produces cattle which may be used to pay the debt on the house of her mother etc., etc. There must be some payment at the time of marriage which may, however, be symbolical. It usually is in the form of one head of cattle.

On the question of the alleged union between Kokodi and Makiti Matladi, the evidence is unsatisfactory in so far as the circumstances surrounding such union are concerned, i.e., in regard to the observance of the usual ceremonies

and...../

and the payment of lobolo. But it must be borne in mind that the alleged union took place many years (probably sixty) ago and the evidence must necessarily be unsatisfactory and incomplete after the lapse of so long a period. It is not disputed that Kokodi and Makiti lived together as man and wife for some years and that four children were born out of their cohabitation. Those children have married and have families of their own. Kokodi herself declares that her marriage with Makiti was valid according to Native custom. This evidence, combined with the legal presumption raised by long cohabitation, establishes a very strong argument in favour of the regularity of the union, which can only be rebutted by very strong evidence. The validity of the marriage with Makiti Matladi is attacked on the ground that the usual ceremonies of marriage were not observed. The evidence relied upon by the Appellants in rebuttal of Kokodi's testimony and the legal presumption referred to above is that of the witnesses Booi Madingwane Tshiane and Swaartbooi Maniyale. Those witnesses, while declaring emphatically that Makiti and Kokodi were married according to Native Law and Custom and lived together as man and wife, qualified their statements by saying that lobolo was not paid at the time of marriage nor were any cattle slaughtered in celebration of the event. The first named witness admits that he was only a herd boy at the time, and Swaartbooi admits that he was an infant. Obviously the Court cannot place any reliance on the testimony of these witnesses. The position, therefore, is that Kokodi's evidence of her marriage to Makiti has not been rebutted. It must be borne in mind that in declaring the regularity of that union Kokodi is testifying against her own interest inasmmch as, if it is Bapedi Law that a widow may not remarry, neither she nor any of her descendants or the descendants of wives acquired with lobolo cattle belonging to her house can be regarded as legitimate members of the house of late Patela Moima with whom she subsequently lived.

In the circumstances the Court can come to no other conclusion than that the union between Kokodi and Makiti Matladi was a regular one and that she was a widow at the time she commenced her cohabitation with Patela Moima.

We also hold, in accordance with the advice of the Assessors, which we accept as a correct exposition of Bapedi customary law, that, being a widow, Kokodi could not enter into a legal union with Patela Moima.

Consequently Patela Moima can only be regarded as a seed raiser to the house of Makiti Matladi and the Appellants, whose mothers were acquired with lobolo cattle belonging to that house, as members of the family of Makiti Matladi and cannot, therefore, be the heirs of Patela Moima.

The legality of the union between Patela Moima and the woman Mampubwana, the mother of Respondent, and the senior of his (Patela's) lawfully married wives, has not been challenged. It follows therefore that Respondent, her eldest son, must be regarded as Patela's heir.

It was argued on behalf of the Appellants that to perpetuate the custom of prohibiting the remarriage of widows would be contrary to public policy and natural justice. It was not shown, however, that the observance of custom has resulted in or is creating any hardship upon the members of the tribe in question. Nor has it been shown that there is

any...../

any desire on the part of the people concerned to abrogate the long standing custom of their tribe.

The appeal is dismissed with costs in this Court on the higher scale. The finding of the Native Commissioner declaring the Respondent (Afrika Mofurwa Moima) the general heir to the Estate of the late Patela Moima is confirmed.

CASE NO. 8: 1936 (T+N) 147.

MZINYAZINYA NZUZA VS. KANISANI MKIZE.

DURBAN. 28th. April, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Practice and procedure - Appeals to Native Commissioners' Courts from Chiefs' Courts. Non-compliance with rules 6, 7 and 8 of Government Notice No. 2255/1928 vitiates proceedings in Native Commissioner's Court.

An appeal from Court of Native Commissioner, Mapumulo.

From the Native Commissioner's record it appeared that Respondent sued Appellant for three head of cattle being balance of lobolo owing for Respondent's sister who entered into a customary union with Appellant during 1926. The Native Commissioner gave judgment for Respondent for three head of cattle and costs.

On appeal to this Court Counsel for Appellant pointed out that the matter was not one of first instance in the Native Commissioner's Court as indicated by the record but was in fact an appeal against a judgment of a Native Chief. This was admitted by Respondent.

HELD: That there had been a gross irregularity in procedure in terms of rules 6, 7 and 8 of Government Notice No. 2255/1928. The whole of the proceedings in the lower Court were set aside and the record returned with a direction that the case be dealt with as an appeal from a Chief's judgment. No order as to costs.

For Appellant: Mr. J.R. McSwaine.

For Respondent: In person.

N.B. - Compare cases Bosiki Makoba vs. Nkanya Makoba, 1929 N.A.C. (N. & T.) 57 and Madonsela vs. Makapela Mnguni, 1929 N.A.C. (N. & T.) 111.

MARTIN, P. (delivering the judgment of the Court):

This is an appeal from the judgment of the Native Commissioner, Mapumulo, pronounced on the 12th. February, 1936 in a case wherein Respondent is represented to have sued Appellant for three head of cattle being the balance of lobolo alleged to be owing for Respondent's sister Ntombintombi who entered into a customary union with Appellant during November, 1926.

The...../

The judgment of the Native Commissioner was in favour of Respondent for three head of cattle and costs.

At the opening of the address of Counsel for Appellant it was pointed out to the Court that the case before the Native Commissioner was not one of first instance as indicated by the record, but was in fact an appeal against a judgment of a Native Chief.

This was admitted by the Respondent, who appeared in person, and who declared that he had brought the case in the Native Commissioner's Court in the form of an appeal after having complied with the Rules governing appeals from the judgments of Native Chiefs.

Accepting the position to be as disclosed this Court must hold that there has been a gross irregularity of procedure, and no other course is open to it except to set aside the whole of the proceedings in the Native Commissioner's Court, with a direction that the case be dealt with as an appeal from a Chief's judgment in accordance with Rules 6, 7 and 8 of the Rules of Native Chiefs' Courts as published under Government Notice No. 2255/1928.

The attention of the Native Commissioner is directed to the decisions of this Court in the cases of Bosiki Makoba vs. Nkanya Makoba, 1929 N.A.C. (T. & N.) page 57 and Ngqozomela Madonsela vs. Makapela Mnguni, 1929 N.A.C. (T. & N.) page 111. (See pages 166 and 167, Blaine).

There will be no order as to costs.

1941 (T+N) 30.
1942 (") 82.

CASE NO. 9.

CLECPAS MATIBELA VS. MANISI KESWA.

DURBAN. 28th. April, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Trespass on Native land - Accompanied by wrongful act - Summons - Issue obscured by multiplicity of claims and pleadings - Sections 26(a) Government Notice No. 2253/1928; 130 and 136, Native Code.

An appeal from Court of Native Commissioner, Pinetown.

Respondent's claim against Appellant in lower Court was for:

(1) £5 damages for destruction of fence;
(2) £20 damages for destruction of sugar cane;
(3) £25 for trespass.

Both parties were represented in the lower Court.

The claim arose out of a dispute between Appellant and Respondent in regard to the common boundary between their lands which was settled by the Superintendent of Reserves. Appellant had gone on to Respondent's land and wrongfully removed Respondent's fence.

The...../

The Native Commissioner awarded Respondent £2 damages and costs on claim (1) and dismissed claims (2) and (3).

On appeal Appellant contended that Respondent had based his claim on trespass only and that Respondent was himself a trespasser.

HELD: That the simple issue was Respondent's right to be on the land.

That the policy of the Native Administration Act and the intention of the rules of Native Commissioners' Courts are to simplify as much as possible the proceedings in such Courts.

That in accordance with sections 130(2) and 136 of the Code the matter had been correctly determined by the Native Commissioner.

Appeal dismissed with costs.

For Appellant: Mr. R.I. Darby.

For Respondent: Advocate R.W. Burne.

MARTIN, P. (delivering the judgment of the Court):

This case originated in the Court of the Native Commissioner, Pinetown, where Manisi Keswa sued Cleopas Matibela for £50 being briefly:

(a) £5 damages suffered by reason of Defendant's wrongful and unlawful removal and destruction of a fence erected by Plaintiff on the land allotted to him on the Umlazi Mission Reserve;

(b) £20 damages for the wrongful and unlawful destruction of sugar cane on the said allotment; and

(c) £25 damages for the unlawful entry by Defendant upon the Plaintiff's said allotment.

At the conclusion of the Plaintiff's case Counsel for Defendant, without calling his client or any witnesses on his behalf, applied for absolution from the instance and a judgment to that effect was recorded.

That judgment was brought in appeal to this Court at its last session and the appeal was upheld. The judgment of absolution from the instance was deleted and the case was sent back to the Native Commissioner for trial to its conclusion.

At the conclusion of the resumed hearing the Native Commissioner recorded a judgment as under:-

(a) For Plaintiff for £2 damages and costs.

(b) Claim dismissed.

(c) Claim dismissed.

The Defendant has now appealed against the judgment on Section (a) of the Claim on the following grounds, viz:-

(1)...../

(1) The judgment is against the weight of evidence and wrong in law.

(2) Plaintiff based his claim on the specific ground that Defendant had trespassed on his (Plaintiff's) allotment and Plaintiff is bound by his averments in his statement of claim.

(3) The evidence conclusively proved that Plaintiff was in fact a trespasser on Defendant's allotment, but notwithstanding the evidence of the Superintendent of Locations and Plaintiff's own witness, Plaintiff (who gave evidence after hearing such adverse statements) persisted in his claim that he had a right to occupy the land in dispute.

(4) Plaintiff did not question the authority of the Superintendent and the Committee to define his proper boundaries and if he was dissatisfied therewith he had his remedy in law to appeal the decision but did not do so.

(5) Defendant carried out the instructions of those empowered to give them but Plaintiff refused or neglected to do so.

(6) The Native Commissioner found as a fact that Plaintiff was at all material times a trespasser on Defendant's allotment.

(7) Being a trespasser Plaintiff has no legal right upon or over the Defendant's allotment, entitling him to sue Defendant in damages.

(8) In any event the Defendant discharged the onus placed upon him by the Honourable the Native Appeal Court on the 23rd. October, 1935.

The Plaintiff has entered a cross appeal against the whole of the Native Commissioner's judgment, the grounds relied upon being:-

(1) That the amount of damages awarded in respect of Claim (a) of the summons is inadequate.

(2) That in failing to award damages in respect of Claims (b) and (c) of the summons, and dismissing such claims, the judgment is against the weight of evidence given in the case, which evidence established:-

(a) That the Plaintiff was in bona fide, authorised, and lawful occupation of certain land in the Umlazi Mission Reserve.

(b) That the Plaintiff had planted cane upon such land.

(c) That Plaintiff had enclosed such cane with a fence.

(d)...../

(d) That Defendant removed and damaged Plaintiff's said fence, and erected other fencing posts upon the land occupied by Plaintiff as aforesaid, and in doing so, damaged Plaintiff's said cane.

(e) That Plaintiff was therefore entitled to judgment in his favour in respect of all the claims made in the summons.

The facts of the case are briefly as follows:-

The parties to the case are occupants of the Umlazi Mission Reserve where a communal system of tenure obtains. Garden plots are allotted to the tenants by an officer styled the Inspector of Mission Reserves who, under Section 4 of the Regulations governing Mission Reserves published in Government Notice No. 621 of 1919, is authorised, inter alia, to allot gardens and residential sites and to investigate and settle garden and other disputes.

The parties cultivate garden plots which are separated by a common boundary. That common boundary may be taken to have been a road the course of which followed an irregular line indicated more or less by three trees. Owing to a new road having been laid off the old road was more or less abandoned and became overgrown, with the result that both parties appear to have encroached on it and planted sugar cane. Respondent had erected a two strand fence along the confines of his field. A dispute having arisen between the parties regarding this boundary the matter was investigated by the Inspector of Mission Reserves who found that both parties had encroached upon the road and who therefore pointed out a new and straight road along the line of the three trees, which was to serve in the future as the common boundary. This new demarcation left each of the parties with growing cane on the other's side of the line and the Inspector directed that each party, after reaping his cane, must confine himself to the new boundary.

Appellant removed his cane but before Respondent had done so, and within approximately three months of the Inspector's order, Appellant took the law into his own hands and proceeded to remove Respondent's fence by pulling up six of its poles and removing the wire which was thrown on to the growing cane. It is not claimed by Appellant that Respondent had delayed the removal of his cane after its maturity and we can only assume that it was not yet ready for cutting.

On advice the Appellant re-erected the fence more or less in its original position and condition.

It is in respect of this act of the Appellant that this action has been brought.

Although the summons has been divided into three separate claims there is, in fact, only one cause of action and this Court will deal with it as such.

It has been repeatedly pointed out, and it must be again emphasised, that the whole policy and the intention

of...../

of the Native Administration Act and the Rules governing Courts of Native Commissioners is to simplify as much as possible the proceedings in such Courts. The rules make no provision as to written pleadings and Section 26(a) specially provides that on appearance of the parties

> "The Court shall before hearing evidence explain "the summons to Defendant and call upon him to "answer the claim therein and to prefer any "counter-claim he may have, which the Plaintiff "shall be called upon to admit or deny. Where- "upon the Court shall proceed with the hearing "of the cause summarily and without further "pleadings."

The complicated procedure in this case has tended to obscure the simple issues between the parties, which are:

(1) Respondent's right to occupy the land at the time of the admitted removal of his fence? and

(2) Whether Appellant's wrongful act gives Respondent a remedy in damages?

The answer to issue (1) must, in the opinion of this Court, be in favour of Respondent.

In regard to issue (2), Section 130 of the Natal Native Code reads as follows:

> "Except as is expressly in this Chapter otherwise "provided, a wrongful act committed against any "Native founds an action on the part of such "Native for damages against the transgressor etc., "etc."

Provision is 'otherwise provided' by Section 136 of the Code which reads as follows:-

> "Trespass on cultivated land does not found an "action for damages unless the trespass is "accompanied by special damage."

In argument it was contended that Section 136 precluded an award in the absence of proof of special damage. In our opinion Section 136 is not applicable because the issue is not based on trespass on cultivated lands but on a wrongful act within the meaning of Section 130 of the Code.

Appellant's act was undoubtedly a wrong such as is recognised in Native Law and he is entitled to a remedy under Section 130 even in the absence of proof of specific damage.

We are not therefore prepared to interfere with the judgment of the Native Commissioner which is hereby confirmed.

It follows from the above remarks that the cross appeal falls away. There would not have been any necessity for such cross appeal if the Native Commissioner had taken

the...../

the view we have taken and treated the case as single claim. In the circumstances we are not disposed to mulct the Respondent in costs in respect of his cross appeal.

The appeal is dismissed with costs.

CASE NO. 10. 1938(T.N)155.

LSONGI NGCOBO VS. LASHINGANA MASINGO.

DURBAN. 29th. April, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Marriage - Validity of - Agreement to marry according to Christian rites - Special marriage licence taken out - Marriage not solemnised - Subsequent cohabitation - Absence of essentials under customary law - Sections 148 to 151, Schedule to Law 19/1891 (Natal).

An appeal from Court of Native Commissioner, Ndwedwe.

Appellant was awarded ten head of cattle in a Chief's Court being the dowry paid by his late father Tshoko to Respondent for his daughter Nomabulawa. Appellant's contention was that there was no marriage between his father and the daughter of Respondent. Respondent appealed to the Native Commissioner's Court. It was held that the essentials of a Native marriage as defined in Section 148 of the old Code of 1891 were present and the appeal was upheld by the Native Commissioner.

The facts are that Tshoko and Nomabulawa agreed to marry according to Christian rites. They proceeded with Respondent to the Magistrate on the 8th. September, 1925, and obtained a Special Marriage Licence under Section 2, Law 46 of 1887 (Natal). Declarations were made by the parties to the effect that they desired to marry each other and by Respondent that he consented to the marriage and the receipt by him of part of the lobolo. The marriage by Christian rites did not take place but the parties cohabited with each other at Respondent's kraal for a long time. A male child was born.

HELD: That there was no valid Christian marriage in terms of Law 46 of 1887.

That as the requirements of Sections 148 to 151 of the Schedule to the old Code, Law 19 of 1891 were not complied with, there was no customary union.

Appeal upheld with costs and the judgment of the Lower Court set aside.

For Appellant: In person.

For Respondent: In default.

MARTIN, P. (delivering the judgment of the Court):

This case originated in the Court of the Native

Chief...../

Chief Dumezweni where the Appellant claimed from Respondent the return of seventeen head of cattle, being five head paid by his late father Tshoko as lobolo for Nomabulawa, the daughter of Respondent, and twelve head the increase thereof, such claim being based on the contention that there was no marriage or customary union between Tshoko and Nomabulawa.

The Chief gave judgment in favour of Appellant for ten head of cattle and costs, thereby holding, in effect, that there was no legal union between the Appellant's father and Respondent's daughter.

That judgment was taken in appeal to the Native Commissioner, Ndwedwe, who held that the essentials of a Native marriage as defined in Section 148 of the Old Natal Code of Native Law, which is applicable to this case, were present and that the union between Tshoko and Nomabulawa was a binding one and that in consequence no lobolo is returnable. The Native Commissioner upheld the appeal and set the Chief's judgment aside.

It is common cause that Tshoko and Nomabulawa agreed to marry each other according to Christian custom and with that object in view proceeded together with the Respondent to the office of the Magistrate, Ndwedwe, on the 8th. September, 1925. for the purpose of procuring the Special Licence to marry, required by Section 2 of Law 46 of 1887, Natal, (entitled "To regulate the marriage of Natives by Christian Rites"), which Licence was duly issued to the contracting parties. Before the Licence was issued by the Magistrate, declarations were made by the parties thereto to the effect that they desired to marry each other, and by Respondent that he consented to the marriage of his daughter and acknowledged the receipt of five head of lobolo cattle on account of her dowry of seven head.

It is also common cause that the contemplated marriage by Christian rites did not take place, and that the Appellant's father and Respondent's daughter cohabited with each other in the latter's kraal for a number of years, and that as a result of such cohabitation a male child was born who is living with Respondent.

The preliminary question to be decided by this Court is whether or not there was a valid and binding marriage or union between Tshoko and Nomabulawa. It is clear that there was no marriage in terms of Law 48, 1887 supra. Section 148 of the Schedule to Law 19 of 1891 (the old Natal Code) was in force at the time the events under discussion happened. It reads as follows:-

"The essentials of a Native marriage according to "Native Law are as follows:-

"(a) The consent of the father or guardian of the "intended wife. Such consent may not be with-"held unreasonably.

"(b) The consent of the father or kraal head of "the intended husband, should such be legally "necessary.

"(c)...../

"(c) The declaration in public by the intended "wife to the official witness on the marriage "day, that the proposed marriage is with her "own free will and consent."

Section 149 of the Code laid down that whenever a marriage was agreed on between a Native man and a Native woman the day fixed for the celebration of the marriage must be reported to the Chief or headman who in turn were required to direct the official witness appointed in terms of Section 46(f) of the Code to be present at the time and place of the celebration of such marriage.

Section 150 of the old Code detailed the duties of the Official Witness and the ceremonials to be observed during the marriage ceremony.

Section 151 required the Official Witness and the husband to proceed within 30 days after the marriage to the office of the Administrator of Native Law for the purpose of registering the marriage.

It is clear that none of the requirements of the sections quoted were observed in this case, at least not in the manner required by Law. It cannot be held that the proceedings before the Magistrate in connection with the application for a Special Licence to marry under the provisions of Law 46, 1887, constitute a sufficient compliance with the requirements of Section 148 of the Code. There is no evidence on the record of any of the ceremonials usually observed in the celebration of a Native customary union, such as feasting, dancing etc. It may be argued that such ceremonial was dispensed with because the woman was not a virgin, having already borne three illegitimate children at the time she commenced cohabitation with Tshoko. But, as stated by Lugg in the case Jim Nsele vs. Ndabambi Sikakane (1929 N.A.C. (N. & T.) at page 127), it is necessary even in such cases for the observance of some form of marriage ceremony.

The necessary formalities required by the sections quoted, supra, not having been observed, it is impossible for this Court to support the Native Commissioner's judgment in this matter. We are not prepared to condone loosely formed unions such as this one was and must hold that there was no legal union between Tshoko and Respondent's daughter.

Consequently the Appellant in his capacity of his father's heir is entitled to a return of such cattle as were paid as lobolo, and to any increase which may have accrued thereto.

The appeal is upheld with costs and the judgment of the Native Commissioner is set aside.

The case is remitted to the Native Commissioner with a direction that he try out the issue in respect of the number of cattle returnable and to record a judgment in regard thereto.

CASE...../

CASE NO. 11.

PAPAMU ZIQUBU VS. CHARLES GABUZA.

PIETERMARITZBURG. 4th. May, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Interpleader - Evidence - Burden of proof - Cattle attached in possession of Claimant.

An appeal from Court of Native Commissioner, Dundee.

Respondent is claimant in interpleader proceedings in which Appellant the execution creditor had attached certain cattle in an action between him and one Walter Gabuza (judgment debtor) a son of claimant and resident in claimant's kraal.

In the interpleader proceedings there is no evidence to shew that the cattle were attached in the possession of claimant nor the relationship between the claimant and judgment debtor but these facts were recorded in the original action between Appellant and the judgment debtor (Walter Gabuza) as also the fact that the cattle had been paid to claimant as lobolo by one Sigumbo, brotner of Appellant.

Counsel for Appellant strongly urged that the appeal court should confine itself entirely to the evidence as recorded in the interpleader proceedings, only.

HELD: That although there is nothing on record to shew that the original case was put in, from the evidence recorded in the interpleader proceedings and from the Native Commissioner's reasons for judgment, the lower Court and the parties concerned assumed the position to be as disclosed in the original case.

That as it is admitted that Appellant was at the wedding in connection with which the cattle were paid as lobolo to claimant, the onus of proof rested on Appellant.

Appeal dismissed with costs.

For Appellant: Advocate Jackson.

For Respondent: Advocate Stalker.

STAFFORD (Member), delivering the judgment of the Court:

This is an appeal from a judgment of the Native Commissioner of Dundee in an action in which Charles Gabuza (Respondent) was Claimant in interpleader proceedings and claimed the release of certain cattle which had been attached by Papamu (Appellant) in an action between Papamu and one Walter Gabuza.

The record of the original case between Papamu and Walter Gabuza is attached to the record of the interpleader

proceedings...../

proceedings now before this Court, although there is nothing on record to shew that the original case was ever "put in" during the hearing of the application. The Native Commissioner's "Reasons for Judgment" disclose facts which appear in the original case but which were not adduced in evidence in the interpleader proceedings.

Mr. Jackson who appeared for Appellant (Papamu) strongly urged that this Court should confine itself entirely to the evidence as recorded in the interpleader proceedings and should not be influenced by any evidence recorded in the original action. In the interpleader proceedings there is no evidence to shew whether the cattle were attached in the possession of Claimant (Charles Gabuza) or of the original Defendant (Walter Gabuza) nor does the record shew the relationship of Walter Gabuza to Charles Gabuza. The original case, however, shews that Walter is a son of and resident in Charles Gabuza's kraal and that the action against him should really have been against his father Charles Gabuza, in whose legal possession the cattle were, they having been paid to him as lobolo by one Sigumbo, the brother of Papamu.

There can be no doubt from evidence recorded in the interpleader proceedings and from the "Reasons for Judgment" as furnished by the Native Commissioner, that the Court and the parties to the proceedings all assumed the position to be as disclosed in the original case.

The Court can draw only one inference and that is that the record of the original case was before the lower Court, and that there is no question but that all parties accepted the position as disclosed by the evidence in the original case, and in the circumstances we are admitting the proceedings in the original case.

No evidence was led to shew in whose possession the cattle were when they were attached. Mr. Jackson relies on the endorsement made by the Court Messenger on the Writ of Execution in which he certifies to having attached "eight head of cattle from Walter Gabuza." Mr. Jackson has asked this Court to accept this endorsement as evidence of possession by Walter Gabuza. It might be stated that this endorsement is not evidence and does not, of itself, exclude the possibility of the cattle being in Charles Gabuza's possession. This Court cannot accept Mr. Jackson's contention and in the absence of any evidence of possession the point would have to be cleared up by referring the case back for evidence on the point; but in view of the fact that we have admitted the evidence in the original case, there is no necessity for this action.

In the original case Papamu sued Walter for certain cattle which had been paid as lobolo for Walter's wife by Papamu's brother Sigumbo. Papamu alleged that the cattle were his and were only sisa'd to Sigumbo and that the latter had no right to dispose of them. The real dispute was, therefore, whether the cattle originally belonged to Papamu or Sigumbo. It is obvious that the original action should have been against either Sigumbo or Charles Gabuza or possibly against them both, but certainly not against Walter Gabuza.

Even if we exclude the evidence in the original case, there is sufficient evidence in the interpleader pro-

ceedings...../

proceedings to shew that Sigumbo paid the cattle to Charles Gabuza. This in itself would raise a presumption that the cattle were attached in possession of Charles Gabuza, unless and until evidence was adduced to shew that possession had passed to Walter Gabuza. Papamu has also admitted that the cattle were in the possession of Sigumbo before they passed to Charles Gabuza. This possession by Sigumbo would also raise a presumption of ownership in him, which would throw an onus on Papamu to rebut it. Thus, from whatever angle we look at it, the dispute is one between Papamu and Sigumbo.

Charles Gabuza may have had other remedies open to him to upset the original judgment, viz., by reason of non-joinder or under Rule 30(5) of the Rules of Native Commissioner's Courts, but as he laid claim to cattle which had been attached he rightly brought his action by way of interpleader proceedings, although this method leaves an unsatisfied and wrongly obtained judgment against his son Walter.

The question as to the true ownership of the cattle before their delivery to Charles Gabuza is one entirely of fact. There are no questions of law involved although there are certain presumptions in favour of Sigumbo. These presumptions are: (1) the presumption of ownership derived from possession; (2) that, as the admitted general heir to the father of himself and Papamu, all property other than proved house property would be inherited by him; (3) all property found in any particular house at the death of the kraalhead is presumed to belong to that house (vide cases quoted by Stafford on page 53).

Papamu bases his claim on an alleged agreement of sisa whereby he placed cattle with Sigumbo. He must therefore prove the agreement as well as discharge the presumption in favour of Sigumbo.

Papamu's witnesses give various accounts as to the origin of the cow which is claimed by him; their evidence varies as to who actually bought the cow and what amount was paid for same. It is evident that these witnesses are referring to two separate cows bought from one Mr. Bowman and cannot say which is the cow in dispute. Chief Mlokotwa gives a totally different story in regard to the disposal of the original cow. Papamu's own evidence shews that he had not paid any dipping fees on the cattle in dispute for a period of two years until the case was pending when he paid £1, presumably in order to justify his claim. The reasons for the sisa are variously given: Papamu says the cattle were sisa'd because Sigumbo "had nothing", Nogufa says she sisa'd the cattle because she was leaving the farm.

The probabilities of the case are against Papamu. It is highly improbable that Papamu's mother, when she left the farm and took with her all the cattle belonging to her other sons, would have left any belonging to her son Papamu. Her reason for the sisa does not fit in with her action. Sigumbo was not her son but

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a son of another wife and it is common knowledge that a Native woman jealously guards the property of her own house against any claim by another house, especially the senior or indhlunkulu house.

It was admitted in evidence that Sigumbo did in fact inherit property from his father and also that he received cattle from the lobolo of one of his sisters. There was, therefore, no necessity to sisa cattle to Sigumbo in order to help him. There is no suggestion or evidence that Sigumbo had disposed of any of these cattle and in fact he claims the cattle in dispute are part of them. It is admitted that Papamu was actually at the wedding in connection with which the cattle were paid as lobolo to Charles Gabuza, and yet he suggests that he had no interest in what cattle his brother was paying over. It is more probable that, as stated by Charles Gabuza's witnesses, he actually saw the cattle handed over.

Papamu has failed to discharge the onus placed on him.

The appeal is dismissed with costs and the judgment of the Native Commissioner confirmed.

CASE NO. 12.

NATHIEL BELEPE D/A V3. MANYANA BELEPE.

PIETERMARITZBURG. 5th. May, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASE - Seduction - Damages - Claim extinguished by death of female - Section 137(3), Native Code.

An appeal from Court of Native Commissioner, Nqutu.

Respondent claimed from Appellant and was awarded two head of cattle as damages arising out of the alleged seduction of the former's daughter. Appellant denied the allegation. Respondent's daughter was not called to give evidence.

HELD: That in the absence of evidence by the girl who was seduced and in view of Section 137(3) of the Code, there is no evidence to shew whether or no the girl seduced was alive when the action was brought.

Appeal upheld with costs and the judgment of the Native Commissioner altered to one of absolution from the instance with costs.

For Appellant: Mr. D.L. McGillewie.

For Respondent: In default.

MARTIN...../

MARTIN, P., (delivering the judgment of the Court):

In this case the Respondent claimed from Appellant two head of cattle being damages arising out of the alleged seduction by the latter of his (Respondent's) daughter.

The Native Commissioner's judgment was in favour of Respondent for two head of cattle and costs.

The seduction of the girl was denied by Appellant and the Native Commissioner's judgment is based on the evidence of certain admissions which, so it is alleged, were made by him at an inquiry held by relatives of the parties concerned.

The appeal is brought on the following grounds, viz:-

(1) The absence of evidence by the girl who as seduced;

(2) That Appellant is a minor and was not represented by his guardian at the trial, and the absence of evidence that Litasa is his guardian or in fact that such a party exists;

(3) That there is no evidence that Plaintiff's daughter who is alleged to have been seduced is the one Appellant is alleged to have had intercourse with; and

(4) That there is no evidence that the alleged intercourse occurred between Plaintiff's daughter and Defendant about and within the period of conception.

This Court finds that these grounds of appeal are well founded. The points referred to are, in our opinion, vital to the issue in this matter and in the absence of the evidence referred to it is difficult to understand how the Native Commissioner could have judged the case.

Under Section 137(3) of the Natal Code of Native Law any claim in respect of a seduction is extinguished by death of the girl, and there is no evidence to show whether this girl is alive or not.

The appeal is upheld with costs and the judgment of the Native Commissioner is altered to one of absolution from the instance with costs.

CASE NO. 13.

HEKI NDHLOVU VS. GUGUBANA MOLIFE.

PIETERMARITZBURG. 7th. May, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASE - Customary union in Zululand - Essentials of - Contracting parties Basutos - Lex loci contractus - Sections 59, 35(1) and 144(3), Native Code.

An appeal from Court of Native Commissioner, Nqutu.

Respondent claimed from Appellant the return of eight head of cattle paid to Appellant in anticipation of a proposed customary union between Respondent's son Mzamayi and Appellant's daughter Madefile who died at Respondent's son's Kraal before the union was celebrated.

The Native Commissioner held that a customary union had not taken place and gave judgment for the return of seven head, disallowing one head for the seduction of the girl.

On appeal it was contended that as the parties are Basutos, a valid customary union had taken place according to Basuto Law and that no cattle were, therefore, returnable. Reliance was placed on the judgment in Baliso Thomson vs. Sipaji Zeka, N.A.C. (C. & C.) 1930.

HELD: That as the Natal Native Code, 1932, was extended to, and is of force and effect in, Zululand, under Proclamation 168 of 1932, the essentials of a customary union defined in Section 59 of the Code apply in this case.

That when parties are domiciled in Zululand, contract a customary union there and seek redress in Zululand, they are bound by the provisions of the Natal Native Code.

Appeal dismissed with costs.

For Appellant: Mr. R. Hughes Mason.

For Respondent: Mr. J.D. Jerling.

N.B. - In Chief Marohla vs. Maciti Ncunu, N.A.C. (T. & T.) 1930, it was held that the doctrine of lex loci contractus applies to customary unions.

STAFFORD, (Member), delivering the judgment of the Court:

This is an appeal against the judgment of the Native Commissioner, Nqutu, in respect of a claim by the Respondent for the return of eight head of cattle and their increase paid by Respondent to Appellant as lobolo in anticipation of a proposed customary union between Respondent's son Mzamayi and Appellant's daughter Madefile. Before the customary union was celebrated the girl Madefile died. Appellant alleged that the girl's death was due to child birth consequent on a seduction by Mzamayi. The seduction was not denied but the death was attributed to illness.

The Native Commissioner gave judgment for a return

of...../

of seven head of cattle and costs, presumably disallowing one head on account of the seduction.

Appellant maintained that a valid customary union had taken place under Basuto Law and that therefore no cattle were returnable. The Native Commissioner refused to accept this contention holding that the essentials of a customary union as provided for by Section 59 of the Natal Native Code were absent. This Court upholds the Native Commissioner in his ruling. The lex loci contractus applies in respect of customary unions (see Chief Mafohla vs. Maciti Mcunu, N.A.C. (N. & T.) 6/1/1930).

It was argued on behalf of Appellant that as the parties were Basutos they were at liberty to contract a customary union under Basuto Law and that in fact such union did take place. Reliance was placed on the case of Baliso and Melani Thomson vs. Sipaji Zeka, N.A.C. (C. & O.) 2/7/1930 in which the above principle was laid down. This Court is in agreement with that decision in so far as it does not apply to Natal. In Natal, however, the Native custom and law has been codified and in terms of Section 24 of the Native Administration Act this Code applies to Natal and may be applied also to Zululand by Proclamation. Under Proclamation 168/1932 it has been so applied to Zululand and is therefore of full force and effect in Natal and Zululand. Section 144(3) of the said Code reads as follows:

> "(3) Where Native Law is applied in any such matter "as is referred to in section eleven of the Act, "the Court may take cognisance of any relevant "native custom ..... provided that "where such custom is so defined and dealt with "the provisions of this Code shall prevail".

The essentials of a customary union have been "defined and dealt with" in Section 59 and this section must therefore apply regardless of the particular custom followed by the parties. As long as the parties are domiciled in Natal, contract a customary union in Natal, and seek redress in Natal, they are bound by the provisions of the Natal Native Code.

The evidence and the reasons for judgment show that the only point at issue in the lower Court was as to whether or not there was a valid customary union. Having held that no such union exists the provisions of Section 85(1) of the Code apply and the Respondent is entitled to recover any cattle he may have advanced as lobolo, with any increase or less any decrease which may have taken place.

The Respondent never counterclaimed in respect of any deductions which he may have been entitled to make nor has any evidence in this respect been led. He will therefore not be precluded from bringing any claim which he may wish to make in respect of any special damage which he may have suffered.

The appeal is dismissed with costs and the judgment of the Native Commissioner confirmed.

CASE...../

1948 (T+N) 12-14.

CASE NO. 14.

TIKI NXUMALO VS. NKOMISHI NZUZA.

PIETERMARITZBURG. 6th. May, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Seduction of woman not a virgin - Damages - Inadmissibility of local custom in conflict with principles in Native Code - Sections 137(1), (3) and 144 - Costs.

An appeal from Court of Native Commissioner, Utrecht.

Appellant was awarded two head of cattle in a Chief's Court in respect of the seduction of his daughter who was not a virgin.

On appeal to the Court of Native Commissioner the number was reduced to one head of cattle with costs.

Appellant appealed to this Court on the grounds that the judgment of the Native Commissioner is contrary to a local custom which prevails in the Utrecht District under which two head of cattle are claimable in respect of every child born after the first child and that Respondent should not have been awarded costs in the lower Court.

HELD: That although Section 144 of the Code provides that the Court may take cognisance of any relevant Native custom whether or not such custom is defined and dealt with under the Code, it contains a proviso that "where such custom is so defined and dealt with the provisions of the Code shall prevail". That Section 137(1) of the Code provides for damages of a beast for each child born to the seducer. It does not refer to children borne by a girl who is not a virgin, to persons other than the seducer.

That in view of the principle embodied in Section 137(3) and the ratio decidendi of the case Msonti vs. Dingindawo, 1. N.H.C. 1927 and A.D. 1927, under Native Law the universally recognised custom is that one beast is payable for each child borne whether to a virgin or to a girl who is not a virgin.

That as Respondent had substantially reduced the judgment on appeal he is entitled to costs in the lower Court.

Appeal dismissed with costs.

For Appellant: Advocate V.A. Von Gerard.

For Respondent: Mr. Wiid of Messrs J. Hershensohn.

Cases quoted: Msonti vs. Dingindawo 1 N.H.C. 1927; Kula Mazibuko vs. Dhlozi Mazibuko N.A.C. (N. & T.) 1930.

As to costs: Yubete vs. Boniface N.A.C. (N. & T.) 1934.

MARTIN...../

MARTIN, P. (delivering the judgment of the Court):

This is an appeal against the judgment of the Native Commissioner of Utrecht in an action which came before him in the form of an appeal from Chief Gogo in which Appellant was awarded two head of cattle for and as damages by reason of Respondent having impregnated his daughter. The daughter was not a virgin but had previously had a child by another man. The Native Commissioner amended the judgment to one for Appellant for one beast only with costs and relied on Section 137(1) of the Code and Msonti vs. Dingindawo 1 N.H.C. 1927 and A.D. 1927.

Section 137(1) refers to a seduction and it provides for damages of a beast for each child born to the seducer. It does not, however, refer to children borne by a girl who is not a virgin to persons other than the seducer. In view, however, of the principle embodied in Section 137(3) and the ratio decidendi of the case Msonti vs. Dingindawo, we must hold that under Native Law the universally recognised custom is that a beast is payable for each child born whether to a virgin or to a girl who is not a virgin.

The appeal, however, is based entirely on the grounds that the judgment is contrary to a local custom which prevails in Utrecht District under which two head of cattle are claimable in respect of every child born after the first child.

It was held by this Court in Kula Mazibuko vs. Dhlozi Mazibuko N.A.C. (N. & T.) 23/6/1930, that the Court will refuse to recognise a local custom which is contrary to universally recognised customs, and in view of the ruling given above this Court cannot uphold Appellant's contention. Although Section 144 of the Natal Native Code provides that "the Court may take cognisance of any relevant native custom ..... whether or not such custom is defined and dealt with under this Code" it contains a proviso that "where such custom is so defined and dealt with, the provisions of this Code shall prevail". To admit such a local custom would not only be in conflict with the principle of Section 137(3) referred to but would also defeat the object of Section 87 of the Code under which the lobolo payable is limited.

Appellant also contends that Respondent should not have been awarded costs, but as Respondent had always been willing to pay one beast but had refused to pay a second and had had his contention upheld, he was entitled to costs in the Native Commissioner's Court. He would also be entitled to them on the ground that he had substantially reduced the judgment on appeal (vide Yubete vs. Bonifase - N.A.C. (N. & T.) 23/4/1934).

This Court wishes to direct the attention of the Native Commissioner to the fact that Rule 7 of the rules governing appeals from Native Chiefs has not been complied with, and also to the irregularity of admitting the Exhibit B. which is purely a private opinion on a matter of law. The Native Commissioner should himself interpret the law and such law cannot be affected by any opinion which an administrative officer may have expressed to the Natives of the district.

The appeal is dismissed with costs.

CASE...../

CASE NO. 15. 1938(T+N) 187. 1944(") 48.

KITANA XULU VS. ELIZABETH XULU D/A.

PIETERMARITZBURG. 6th. May, 1936. Before Martin, President, Arbuthnot and Stafford, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Practice and procedure - Summons - Misjoinder - Non-joinder of heir - Native woman cannot be sued.

An appeal from Court of Native Commissioner, Nqutu.

In a Chief's Court Respondent the widow of Appellant's half brother was awarded certain sheep which Appellant, who is the ukungena son of the late Mavovo, claimed as his property.

Respondent had claimed the property for and on behalf of a minor male heir belonging to her house.

Respondent was duly assisted by an alleged guardian but her real guardian is probably Appellant. The minor male heir was not cited as Defendant.

The Native Commissioner upheld the judgment of the Native Chief.

HELD: That where there is an heir and where the property in dispute is estate property, it is improper to bring an action against a female as females cannot inherit estate property under Zulu law.

That the proper procedure is to cite such heir who, if a minor, must be duly assisted by his legal guardian or a curator ad litem appointed by the Court.

The judgment of the Native Commissioner was set aside and the case remitted to him for retrial. Costs of appeal to be costs in the cause.

For Appellant: Mr. J.D. Jerling.

For Respondent: Advocate J.D. Stalker.

N.B. - In this case the Appeal Court raised the question of Respondent's status suo motu as an adverse judgment against her would be prejudicial to the interest of the minor heir to the estate who was not a party to the action.

MARTIN, P. (delivering the judgment of the Court):

This is an appeal from the judgment of the Native Commissioner, Nqutu, in a case which came before him as one of first instance but was later converted into an appeal against a decision of the Chief Sibonisile.

The parties to the case were the Appellant Kitana Xulu, the alleged ukungena son of the late Mavovo Xulu, and the Respondent Elizabeth, the widow of one Mbulaleni, the offspring of the said Mavovo by a woman named Ma-Mcunu.

The...../

The cause of action was certain sheep in the possession of Respondent which Appellant claimed as his property, alleging that they had been wrongfully and unlawfully taken from him and delivered to Respondent by Chief Siboniseleni by virtue of a judgment in favour of Respondent.

The Native Commissioner dismissed the appeal with costs and upheld the judgment of the Native Chief which was in favour of Respondent.

An appeal has been brought against that judgment on grounds which need not be considered now.

The Respondent being a female and a minor in Native Law the question of her status in this matter was raised suo motu by this Court and Counsel for the parties were asked to consider whether or not it is competent to sue a Native female duly assisted by her guardian, as was done in this case, or whether the more correct procedure would be to sue her guardian or the heir of an estate personally.

After argument on these lines and after the consideration of the point at issue this Court has come to the conclusion that where there is an heir and where the property in dispute is estate property as is the case in this matter, it is improper to bring an action against such female as females cannot inherit property under Native Law; further, the effect of an adverse judgment against the woman would be prejudicial to the interest of the minor heir to an estate, who was not a party to the action. The proper procedure is to cite such heir and if he is a minor he must be duly assisted by his legal guardian or a curator ad litem must be appointed by the Court.

For this reason the judgment of the Native Commissioner is set aside and the case remitted to him for re-trial and the delivery of a fresh judgment. In order to avoid the unnecessary cost of a re-trial de novo, and provided the parties agree, the name of Elizabeth should be deleted from the summons and that of Mavovo's minor offspring, Gideon, substituted, the existing evidence to be retained with the right to either party to recall any of the witnesses who have already given evidence and such other witnesses as may be available, if necessary, to clear up obscurities or to supplement the evidence in the case.

In the special circumstances of this case it is ordered that the costs of this appeal shall be costs in the cause.

1937 (T & N) 121

CASE NO. 16.

XABULA MASONDO VS. YOMANE SHOBA.

PRETORIA. 18th. June, 1936. Before Martin, President, Lowe and Brink, Members of Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Zulu custom - Customary union - Woman dying in child-birth at husband's kraal shortly after marriage without issue - Lobolo - Rights of surviving spouse.

An appeal from Court of Native Commissioner, Piet Retief.

Respondent claimed from Appellant the return of nine head of cattle or their value £27 in the lower Court alleging that his son was engaged to Appellant's daughter; that fifteen head of cattle had been paid as lobolo but that the woman died before the marriage had taken place. Appellant pleaded that a customary union had taken place; that the woman died in child-birth and that no lobolo was returnable. Judgment was given for Respondent.

HELD: That, on the facts, a customary union had taken place. But that the general rule among Native tribes is that when a woman dies shortly after marriage without issue, the survivor may claim that the woman be replaced or that the lobolo or some part of it be returned.

That even where the death of the woman is the result of child-birth, if she leave no issue, the surviving party may claim the return of portion of the lobolo.

That as Appellant has gained no substantial benefit, the appeal is dismissed with costs.

For Appellant: Mr. MacRobert.

For Respondent: Mr. Hart.

N.B. - The judgment in Simelane vs. Sugazie, 1935 N.A.C. (N. & T.) distinguished.
Judgment of Jackson, J. in Mgidhlana vs. Munyu, 1912 N.H.C. followed.

BRINK (Member), delivering the judgment of the Court:

In this case Plaintiff claimed from Defendant the return of nine head of cattle or their value £27 alleging that his (Plaintiff's) son was engaged to Defendant's daughter; that fifteen head of cattle had been paid as lobolo but that the woman died before the marriage took place.

The plea to this claim was that a customary union between the parties had in fact taken place; that the woman died in childbirth and that accordingly no lobolo was returnable.

The Native Commissioner found as a fact that no customary union had taken place and gave judgment for Plaintiff as prayed with costs.

Against this judgment an appeal has been noted on various grounds, inter alia:

1. That the judgment is against the weight of evidence.

2...../

2. That the Court erred in finding there was no customary union and

3. That as Defendant's daughter had died in childbirth, Plaintiff's son being the father of the child, lobolo cattle need not, according to Native Custom, be returned.

It is common cause that all the parties consented to the union; that fifteen head of cattle were paid in respect of lobolo; that the man and woman cohabited; that the latter died and was buried at Plaintiff's kraal while giving birth to a child of which the Plaintiff's son was the father, and that the child did not survive its mother.

The parties in the case, which comes from the district of Piet Retief, are Zulus.

The first point for decision in this appeal is whether the parties were united in a customary union or not.

The Native Commissioner has found that they were not but he has given no reasons for his conclusion other than that he did not rely on the evidence of Defendant.

Apparently also he felt that because there was no marriage feast, there was no marriage.

The essentials of a customary union are governed by the lex loci - Dhlamini vs. Mcunu, 1929 N.A.C. (N. & T.) 151. In Natal and Zululand the matter is regulated by the Code - see Section 59. In the Transkei it has been held that the main essentials are the payment of lobolo and the handing over of the woman - Rabayi vs. Vangidzi, N.A.C. Transkei 1925 (5 Prentice-Hall M.6). In the Transvaal in industrial areas it has been held that, as far as Zulus are concerned, the essentials are:-

An intention of the parties to enter into a binding union;

The consent of the parties;

An agreement to pay lobolo;

The handing over of the woman and cohabitation - See Mazibuko vs. Manana, 1931 N.A.C.(N. & T.).

In the last mentioned case it was recognised that there are circumstances in which a strict adherence to tribal customs is not always practicable and it is true that there is a growing tendency to disregard some of the ceremonials which are observed in places where custom is still strictly followed.

The present case is distinguishable from the case of Mahongane Simelane and Another vs. Petrus Sugazi, 1935 N.A.C. (N. & T.) recently heard in this Court and which has been strongly relied on by Counsel for Respondent.

In that case there was no evidence at all, either direct or implied, that there had been any formal or any sort of handing over of the bride.

In...../

In this case it is abundantly clear that the essentials of a customary union were all present, viz: the consent of the parties, the passing of lobolo and the handing over of the bride - an essential which the Court must be compelled to imply from the surrounding circumstances, namely, that the girl was fetched by the Plaintiff to his kraal with the consent of her father.

For this reason the Court finds that the Native Commissioner erred in holding that there was no customary union between the parties. The Appellant has therefore justified his second ground of appeal. This decision, however, does not dispose of the matter.

The Appellant contends that there being a customary union but the woman dying in childbirth, he is not liable for the return of the lobolo.

The general rule among the Native tribes is that when a woman dies shortly after marriage without issue, the return of the lobolo or some part of it may be claimed or the woman may be replaced.

In the present case it is clear that the woman died in childbirth leaving no issue, apparently within approximately a year of her union, and the Appellant advances these facts as a ground for avoiding this general rule.

Among Zulus particularly, it is the custom for a portion at least of the lobolo to be returned. The principle involved is very clearly set out in a judgment by Jackson, J. in the case of Mgidhlana vs. Munyu, 1912 N.H.C. p.45. The following passage is relevant:

> "It is opposed to European ideas, and whatever "personal views may be held on the equity of the "system from our own standpoint, it must be borne "in mind that, from the native point of view, it "is in conformity with their social laws governing "marriage. A man takes a wife, and pays heavily "for the privilege in the form of lobolo because "he wishes to have a large family which he may "reasonably expect to more than recoup him for "his expenditure; and when the wife dies before "there is a possibility of issue she must be re-"placed, or some refund be made of the marriage "consideration."

This is the principle which we consider should be applied amongst Zulus, even where the death of the woman is the result of childbirth.

The appeal on this point cannot, therefore, be supported.

In the circumstances we consider the Native Commissioner's judgment in so far as the award of the cattle is concerned should not be disturbed. We do not think the value he has placed on the cattle is unreasonable.

On the question of costs, the Appellant has gained

no...../

no substantial benefit and should therefore pay the costs of this appeal. Counsel having agreed that costs shall be on the higher scale, it is ordered accordingly.

The appeal is dismissed with costs on the higher scale.

MARTIN, (President):

I wish to remark that it is with the greatest reluctance that I concur in this judgment in so far as it concerns the question of the validity of the union between the Plaintiff's son and Defendant's daughter.

I have found it difficult to arrive at the conclusion that the union was valid and binding and in accordance with Zulu custom.

In Zulu Law as codified in Natal the essentials of a valid customary union are:-

(1) The consent of the father or guardian of the intended wife;

(2) The consent of the father or kraal head of the intended husband, where consent is necessary.

(3) A declaration in public by the intended wife to the official witness at the celebration of the union that the union is with her own free will and consent.

As regards the Zulus of the Transvaal it was held in Lena Mazibuko vs. Amos Manana (1931 N.A.C. (N. & T.)) that the essentials of a customary union amongst Zulus in the Transvaal industrial areas are:-

(1) An intention of the parties to enter into a binding union;

(2) The consent of the parties and of their guardians, where necessary;

(3) A valid agreement to pay lobolo;

(4) A handing over of the woman which can be done by implication; and

(5) Cohabitation.

In this case the first, second, third and fifth of the last named essentials are present, but the evidence in regard to the fourth essential is most inconclusive. There appears to have been an almost complete absence of the formalities which are usually observed on the occasion of a Zulu marriage, and such "handing over" of the bride as did take place was so informal and casual that I find it difficult to agree that it constituted a sufficient compliance with the essential under discussion.

According to the Plaintiff's recorded evidence the actual handing over of the girl took place during an

inquiry...../

inquiry held at the kraal of the Chief of the parties on an occasion subsequent to the delivery of lobolo when the matter of the girl's pregnancy was discussed. Plaintiff says that, with the approval of the Defendant, he took the girl to his kraal where she lived and cohabited with his son in the relationship of man and wife up to the time of her death. He contended, however, that this did not complete the marriage formalities and that no valid union was concluded.

It is obvious, however, from the Plaintiff's own conduct in claiming a refund of only nine of the fifteen lobolo cattle paid in respect of the union instead of the full number plus the increase thereto to which he would be entitled if there had been no marriage, that he was satisfied that all the necessary formalities had been observed.

I am not prepared to believe that Plaintiff's omission to claim back the full lobolo was actuated by altruism on his part. It seems to me that the obvious explanation is that Plaintiff considered that a completed contract of marriage had been entered into.

It is this factor, indicating as it does that there was at least an implied compliance with the fourth essential (supra), that has enabled me to concur with the view that there was a binding and concluded customary union according to the laws of the Zulus of this Province.

I wish to comment further on the extremely loose manner in which unions of the nature under discussion appear to be arranged in the Province of the Transvaal where no written law on the subject exists. The tendency to ignore the traditional solemnities of such an important event as the giving and taking in marriage is alarming and should be checked. In my opinion something more is required than the mere handing over of a woman to a man as if she were a mere chattel. The occasion should be marked by some sort of ritual in which the parents or elders of the contracting parties or their representatives participate and this should be not merely formal but also of a public character. This is very necessary in order to avoid the possibility of coercion of the bride and in the interests of morality.

CASE NO. 17.

LOKWANA MLILO VS. NDLONGO MLILO.

DURBAN. 4th. August, 1936. Before B.W. Martin, President, W.R. Boast and A. Eyles, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Defamation - Words not defamatory per se become so in the mind of a Native in certain circumstances - Repetition implies identification with the tort-feasor - Express malice also assumed from actions.

An appeal from the Court of the Native Commissioner, Kranskop.

Appellant...../

Appellant claimed £50 as and for damages sustained as a result of two defamatory statements said to have been uttered by Respondent. The Native Commissioner found that the evidence did not establish that Respondent uttered defamatory statements and gave judgment in his favour.

HELD: That the case should be decided on the legal issue raised by the recorded admissions of Respondent, to the effect that he publicly repeated statements made by his son, Songobozana, to the effect that his illness was caused by Appellant's beer. The words alleged to have been uttered were to the following effect: "My child died at my brother's kraal - his beer killed him." The words complained of are not necessarily defamatory per se, but in the circumstances and having regard to the native mind, they could only convey one meaning to the effect that Plaintiff had unlawfully caused the illness and death of Appellant's son, and in this sense were defamatory. The Court was satisfied that in repeating the words complained of, the Respondent identified himself with his son's defamatory statement and express malice was assumed from his actions in becoming a party to the consultation with a witch doctor after his son's death and making a false report to his Chief that Appellant had been "smelt out."

The appeal was upheld with costs and the judgment of the Native Commissioner altered to one in favour of Plaintiff for one head of cattle or its value £5 and costs.

For Appellant: Advocate A. Milne.

For Respondent: Mr. L.T. Buss.

MARTIN, P., delivering the judgment of the Court:

In this case the Plaintiff's claim is for the sum of £50 as and for damages sustained by him as a result of certain two defamatory statements said to have been uttered by Defendant as set out in the statement of claim.

The Native Commissioner found that the evidence did not establish that the Defendant did utter the defamatory statements and he entered a judgment in favour of Defendant with costs.

As regards the first ground of the claim, this Court does not consider it necessary to decide whether or not the finding of the Native Commissioner on facts is correct. The case can be decided on the legal issue raised by the recorded admissions of Defendant to the effect that he publicly repeated statements made by his deceased son Songobozana that his illness was caused by Plaintiff's beer. Defendant has admitted that he repeated his son's words on more than one occasion to a number of people, at his kraal, and particularly on the day of his son's funeral.

At this stage it will be convenient to say that the words complained of are not necessarily defamatory but in the circumstances and having regard to the Native mind they could only convey one meaning and that is that the Plaintiff had unlawfully caused the illness and death of Defendant's son. In this sense the words are defamatory per se.

The Defendant has not justified the use of those words. He attempted to do so by attributing the original utterance to

his...../

his deceased son and pleaded absence of malice.

This Court is satisfied that in repeating the words complained of the Defendant has not only identified himself with his son's defamatory statement but has furthermore inferred that his son's death was caused by Plaintiff.

Express malice on the part of Defendant may be assumed from his actions in becoming a party to the consultation with a witch doctor after his son's death coupled with his subsequent false statement to his Chief that the Plaintiff had been "smelt out", whereas even according to his own evidence the latter was exonerated from blame.

The Plaintiff, on these grounds, is clearly entitled to damages to enable him to cleanse himself of the stigma cast upon him by the Defendant.

In so far as the second allegation is concerned, the Court does not feel justified, on the contradictory evidence before it, in disturbing the finding of the lower Court.

The appeal is upheld with costs and the judgment of the Native Commissioner altered to one in favour of Plaintiff for one head of cattle or its value £5 and costs.

CASE NO. 18.

MANTSHINGO MANQELE VS. SILEVU MANQELE.

DURBAN. 5th. August, 1936. Before B.W. Martin, President, W.R. Boast and A. Eyles, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - General heirship - Right to under old Zululand Code of 1878 - Established by virtue of status of mother - Kraal head cannot arbitrarily appoint son of a junior wife in a death-bed declaration.

An appeal from the Court of Native Commissioner, Nongoma.

Respondent (Silevu Manqele) claimed before the Chief Bhokwe the right to succeed as general heir to his father's estate and Appellant (Mantshingo Manqele) who was already in possession of the estate, resisted the claim. Both parties were the sons of the late Ndabambi - Appellant being the eldest son of his third, and Respondent the eldest son of his first wife. Appellant contended that his father, on his deathbed, about three years previously appointed him his general heir. The Respondent claimed the general heirship as eldest son of Ndabambi's first wife. (Vide Section 22 of the Zululand Code of 1878 and Section 98 of the New Natal Code published under Proclamation 168/1932).

The Chief gave judgment for the Appellant which decision was reversed by the Court of Native Commissioner on appeal, which decided in favour of the Respondent and declared him to be the general heir, as his father Ndabambi was a commoner, without the right to appoint his third wife as his "inkosikazi."

HELD...../

HELD: That it was established Native Law in Zululand prior to the promulgation of Proclamation No. 168/1932 that in the absence of a clear declaration to the contrary, the first wife taken by a commoner ranks as his chief wife. The Court was unable to draw the inference that Ndabambi's deathbed declaration appointing Appellant as his general heir raised the Appellant's mother (third wife) to the status of chief wife. The eldest son of the chief wife could not be deprived of his inheritance without a formal act of disinherison. A kraalhead has no arbitrary power to appoint his general heir, who acquires his status by virtue of the status of his mother. For these reasons the appeal dismissed with costs.

For Appellant: Mr. M.W. Bennett.

For Respondent: Not represented.

Cases quoted: Baganise vs. Mashesha, 1934 N.A.C. (N. & T.) p.1.
Dingumuzi vs. Zuya, 1915 N.H.C. 95.
Ndhlebe vs. Damana, 1915 N.H.C. 169.
(Stafford, 100).

EYLES, Member, delivering the judgment of the Court:

In this case the Plaintiff, Silevu, claimed before Chief Bhokwe the right to succeed as general heir to the estate of his late father Ndabambi; the Defendant Mantshingo who is in possession of the estate resisted Plaintiff's claim. The Chief gave judgment for Defendant, and Plaintiff appealed to the Native Commissioner in which Court the Chief's judgment was reversed, Plaintiff being declared general heir to his father. The Defendant now asks this Court to restore the original judgment of the Chief and to set aside the declaration of the Native Commissioner.

Both parties are the sons of the late Ndabambi, Plaintiff's mother being Oka Mafihlo and Defendant's mother Oka Msizeni.

Ndabambi had another wife, viz: Oka Nzipo, who was clearly his second wife.

Plaintiff's claim is based on the allegation that he was the first son of the first wife, and that as Defendant was the son of the third wife he has no right to succeed as general heir.

Defendant's contention is that he was appointed general heir by Ndabambi on his deathbed, approximately three years ago.

From Defendant's own evidence it is conclusive that Oka Mafihlo (Plaintiff's mother) was the first wife. Further, according to Mkandhlweni, Defendant's witness, Ndabambi - on his deathbed - referred to Plaintiff as "his eldest son."

It is common cause that Oka Msizeni was the third wife.

In coming to a decision on the issues before the Court it is not necessary to examine closely the conflicting evidence as to Defendant's allegation that he was appointed general heir by Ndabambi as the matter can be disposed of on the question as to the validity of such an appointment, if made.

On...../

On the authority of Baganise vs. Mashesha, 1934 N.A.C. (N. & T.) p.1, Dingumuzi vs. Zuya, 1915 N.H.C. 95, and Ndhlebe vs. Sawana, 1915 N.H.C. 168 (Stafford,100), it was established Native Law in Zululand prior to the promulgation of Proclamation No. 168/1932, that in the absence of a clear declaration to the contrary the first wife taken by a commoner ranked as his chief wife.

It is contended by Defendant's Counsel that an inference should be drawn from Ndabambi's deathbed declaration appointing Defendant as his general heir that Defendant's mother was thereby raised to the status of chief wife; there is no other evidence to support this contention and the Court is unable to draw such an inference.

Furthermore, the eldest son of the chief wife could not be deprived of his inheritance without a formal act of disinherison. The only evidence on this point is Ndabambi's alleged deathbed declaration, which cannot be accepted as an act of disinherison.

An heir could only be deprived of his rights for some good reason, and beyond the statement of Cka Msizeni that Ndabambi said on his deathbed "he (Plaintiff) does not give me anything" there is no evidence of improper conduct on the part of Plaintiff.

Defendant's further ground of claim to the estate - that his mother was affiliated to Oka Nzipo - even if established is of no avail as Oka Nzipo was merely the second wife and not the chief wife.

A kraalhead has no arbitrary power to appoint his heir. The heir acquires his status by virtue of the status of his mother.

Where it is contended that the ordinary rule of law has been departed from a heavy onus rests upon the party making such a contention to prove his assertion and in the opinion of this Court Defendant has failed to discharge this onus.

While admitting that Ndabambi may have had reasons for wishing to prefer Defendant as his heir, the method he adopted was not in accordance with the recognised requirements of Native Law as above stated.

For these reasons the appeal is dismissed with costs.

CASE NO. 19.

EWART IRIZE VS. NKOBE MTCWABE.

DURBAN. 6th. August, 1936. Before B.W. Martin, President, W.R. Boast and A. Eyles, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Practice and procedure - Defamation - Summons - Nonjoinder - Guardian cannot sue in his own name for a personal wrong suffered by his daughter - Claim should be brought either by the girl defamed duly assisted by her father or guardian, or by the latter in his capacity of guardian. -

Sections...../

Sections 130 and 133 of the Natal Native Code (Proclamation 168/1932) and Section 15 of Act 38 of 1927.

An appeal from the Court of the Assistant Native Commissioner, Pietermaritzburg.

In this case Appellant, Ewart Mkize, sued Respondent Nkobe Mncwabe, duly assisted by his father, for one beast or £5 as damages for defamation of the character of his daughter, Minah, in that Respondent had stated that he had contracted a venereal disease from Minah.

The Court, of its own motion, raised the question whether the proceedings in the lower Court were not bad ab origine, in that Appellant had sued in his own name for a personal wrong alleged to have been suffered by his daughter. Mr. Hodson on behalf of Appellant applied for an amendment of the summons to cure the defect to show that the claim was made by Appellant in his representative capacity, but the Court held that the irregularity disclosed in the summons was of so serious a nature that it could not allow the application, even under the wide powers conferred by Section 15 of the Native Administration Act, No. 38 of 1927.

The proceedings in the lower Court were set aside with costs against Appellant in both Courts.

For Appellant: Mr. T.B. Hodson.

For Respondent: Mr. E.P. Fowle.

MARTIN, P., delivering the judgment of the Court:

In this case Plaintiff, solely in her personal capacity, sued Defendant, duly assisted by his father, for one beast or £5 as damages for the defamation of the character of his (Plaintiff's) daughter Minah, in that the Defendant had stated that he had contracted venereal disease from Minah.

This Court, of its own motion, raised the question whether the proceedings in the lower Court were not bad ab origine, in that the claim was brought by Plaintiff in his own name for a personal wrong alleged to have been suffered by his daughter.

Mr. Hodson, on behalf of Plaintiff, thereupon formally applied for an amendment of the summons to cure the defect referred to by adding the words "in his capacity of guardian of his daughter Minah" after Plaintiff's name.

After argument and consideration of the provisions of Section 130 and 133 of the Natal Code of Native Law and Section 15 of the Native Administration Act No. 38 of 1927, the Court holds that the irregularity disclosed in the summons is of so serious a nature that the Court should not, even under the wide powers conferred on it by Section 15 supra, allow the application.

The proceedings in the lower Court are set aside with costs against Appellant in both Courts.

CASE NO. 20.

HLOANI NGEWA VS. NYAIZA DUBE.

ESHOWE. 22nd. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and J.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Application for extension of time within which to note appeal - Merits solely on credibility - Inability to walk insufficient excuse.

In the matter of an application for an extension of time in which to note an appeal from the Court of Native Commissioner, Mtunzini, reversing a Chief's judgment.

McLOUGHLIN, P. (delivering the judgment of the Court):

This is an application for condonation of delay in noting an appeal against the Native Commissioner's decision reversing a Chief's judgment.

The Native Commissioner gave judgment on the 17th. April, 1936, and on the 29th. June, 1936, the Applicant in his affidavit supporting his prayer, alleges that he had been suffering from rheumatism and had been unable to walk for nearly two months, and that owing to this illness he had been unable to attend to any business during that period.

The Applicant was ill during the time the original transaction took place through the medium of his son. Applicant has not indicated why the same agent was not employed in prosecuting his appeal. He was able to attend the Courts of the Chief and the Native Commissioner (the latter twice). In these circumstances this Court is of opinion that the reason given for the delay is not sufficient to justify any indulgenee especially as the judgment in question is attacked merely on the grounds of credibility, there being, ex facie, no other reason for disturbing the judgment.

The principles laid down by this Court in the case of Silo Mdhlalose vs. M. Nzuza, 1935 N.A.C. (T. & N.) p. 31 following the decision in Cairn's Executor vs. Gaarn, 1912 A.D. 181 will be applied and the application for leave to appeal will be refused with costs.

For Applicant: Mr. J.S. Chatwind.

For Respondent: In person.

1937 (T&N) 95, 126.

CASE NO. 21.

LOANIBENA MBATA VS. NGANGANANI XABA.

ESHOWE.. 22nd. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and J.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE...../

NATIVE APPEAL CASES - Application for extension of time in which to appeal refused - Verbal intimation of intention insufficient - Lack of funds - Merits of case.

An application for an extension of time within which to lodge an appeal from the Court of Native Commissioner, Nongoma.

McLOUGHLIN, P. (delivering the judgment of the Court):

This is an application for leave to note an appeal after the due date.

Judgment was given in the Native Commissioner's Court against the Applicant on 23rd. June, 1936. He then intimated verbally to the Clerk of the Court that he wished to appeal against the judgment - after having been fined for contempt of Court for persisting in showing in Court his dissatisfaction with the judgment.

The Applicant was unable to deposit the fee of £5 and his appeal was accordingly not accepted by the Clerk of the Court.

On the 15th. of July, 1936, one day after the due date, he reappeared at Court and tendered his notice of appeal which was rejected and the present application ensued. The delay is explained as being due to difficulty in raising the fees which were obtained by disposal of a beast at a public sale on the 9th. July, 1936, whereafter Applicant became ill and was unable to attend to his affairs.

On the merits of the case as elaborated by the Applicant before this Court, it appears that he took the woman at her full lobolo value despite two prior illicit unions, and the birth of an illegitimate daughter from one of these unions. He agreed with the bride's guardian to pay full dowry, allowing four head in consideration of receiving rights in this girl.

This practice is not recognised by the Courts, being contra bonos mores, Jazi vs. Mantjozi 1914 A.D. 144: Stafford, p. 48, and this Court must definitely refuse to countenance it in this case. In any event the parties are placed in delicto in having deceived the authorities by making a false statement and the par delictum rule must be applied to Applicant.

The Court must therefore deal with the merits on the basis of a lobolo of twelve head which the Applicant considers as adequate in the circumstances. The return of eight head of these cattle may or may not have been an adequate number, but the Native Commissioner is given a discretion in assessing the number and whatever view this Court may have taken in dealing with the case as one of first instance, it must follow the accepted practice in dealing with appeals and not disturb the Native Commissioner's judgment merely on this ground in the absence of any irregularity or manifest injustice.

As there is no prima facie case for disturbing the

judgment...../

judgment of the Native Commissioner, no good purpose will be served by granting leave to note an appeal and the application will accordingly be refused with costs.

Applicant in person.

Respondent in person.

1938 (T & N) 40.
1945 (") 93, 98.

CASE NO. 22.

NQADUZA MYENI VS. GWALAGWALA MABUYAKULU.

ESHOWE. 22nd. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Defamation - Defences available - Section 132 of Natal Native Code - Privilege - Fair and bona fide comment on acts of a public man - Malice to be affirmatively proved.

An appeal from the Court of Native Commissioner, Ubombo.

McLOUGHLIN, P. (delivering the judgment of the Court):

In this action Plaintiff claimed five head of cattle from Defendant as damages for slander uttered at a tribal discussion at the kraal of the Chief when Defendant directed the following words to Plaintiff: "You have utilised the tribal funds in putting up the butcher shop which you are running in Natal, or such other words to that effect."

Both parties conducted their case in person.

Defendant pleaded verbally, admitting the use of the words alleged in the summons. That he used them after Plaintiff had explained how the tribal funds had been accounted for. States he thought Plaintiff had put up the shop for the present Chief Mdolomba.

The evidence discloses that the Plaintiff had acted as Chief of Reserve No. 2 in the Ubombo district until the present year. A meeting was held for the installation of the present Chief Mdolomba. After the installation a discussion followed when the new Chief claimed tribal moneys and fees from the Plaintiff. The proceedings were initiated by the induna of Chief Bogwe who asked the people to sit down so that he could question Plaintiff as to tribal monies collected by him while holding his Acting appointment. Defendant is a resident of the ward.

Plaintiff alleges in his evidence that Defendant was present at the discussion and that he remarked "We are glad father because you have put up a butcher shop. You did well seeing that the cattle were dying, to sell them and put up a butcher shop so as to help Mdolomba."

Plaintiff's witness Mgitshwa deposed that while

Plaintiff...../

Plaintiff was still explaining Defendant got up and said, "We had hoped, as you have never accounted for tribal monies, that you had put up a butcher's shop for Mdolomba." Plaintiff's last witness Msenteli states, "Defendant said to Plaintiff 'we thought that you had seen the cattle dying and that you had put up a butcher"s shop in order to lift up Mdolomba.' I did not think these words were bad. I thought he knew what he was talking about."

Defendant's version is as follows:-

"Plaintiff explained ..... he had collected from the tribe thirty head of cattle and £2.10.0. in cash, he knew of many goats. I then thanked him and said 'We are thankful to you father for your having explained. We are hopeful that you saw the cattle were dying and saw fit to put up a butcher's shop.' Plaintiff got angry then and said the shop had been put up by his son. I asked how it came about that his son had put up the shop only when Plaintiff became Chief. What I meant was that Plaintiff had used the cattle for the butcher's shop. I am convinced that is what happened. Why I am convinced is because Plaintiff's son put up the butcher's shop only after Plaintiff was appointed Acting Chief."

The Native Commissioner gave judgment for Plaintiff for two head holding that the allegation was defamatory and was made maliciously and not in good faith.

Defendant has appealed against this judgment. It is to be regretted that the reasons of the Native Commissioner do not disclose his reasons for findings of law as well as those of fact, as the issue is largely a matter of law.

The Code (Section 132) summarises in two short sentences the law of defamation and adds two provisos introducing the defences of Kixa and privilege, but restricting the latter specifically to reports to a person in authority.

Are other defences available? The Code does not and cannot embrace all the juristic practices of the natives, but where the Code embodies rules of law in distinct terms those rules must be operative in all cases, not expressly or impliedly excluded." Mcunu vs. Mcunu, 1918 A.D. 523.

There can be no doubt that the inclusion in Section 132 of only two defences definitely excludes the other defences.

As my brother Stafford contends in his work on Native Law as practised in Natal, the defence of justification, for example, is available under native law.

This Court has itself given an extensive interpretation to the term "person in authority" in the case of Ntetshana Japa vs. Nomatsheni Sindani, 1934 N.A.C. (T. & N.) p. 29.

This Court will accordingly view the present appeal in the light of any defence available additional to the two mentioned in Section 132 of the Code.

The...../

The case actually involves consideration of a dual defence of qualified privilege and a fair and bona fide comment on the administration by Plaintiff of his office as Acting Chief.

The occasion was unquestionably privileged. The actions of the outgoing Acting Chief were being reviewed in tribal concourse. Every member of the tribe has by custom the right to speak freely and openly in discussing such actions in the meeting under protection of a qualified privilege. The Plaintiff had acted in a public capacity and had created a situation in which the members of the tribe were invited by that act as well as by custom to criticise, comment or pass judgment on his acts.

It is indeed a general rule recognised by the Common Law as intimated by Innes, C.J. in Crawford vs. Albu (1917 A.D. 102): "Modern conditions demand the utmost freedom of criticism on all matters of public interest and the right of fair comment is the outcome of this."

Where the Defendant acts within his rights there can be no injuria. If he shows that the occasion was privileged bona fide and honest belief in the statement are presumed and the Plaintiff must affirmatively prove malice.

To establish privilege he must, however, show that his statement was true and for public interest.

In the present instance the public interest is self evident.

That the statement was true in regard to the establishment of the butcher's shop may be accepted for the purposes of this decision. The parties are Zulus living in a Native Reserve in Zululand. The kraal head system is firmly established there. The family is a joint association. It is controlled by the kraal head, and a son is usually merely an agent of the head. The Appellant would, in the native mind, be justified in regarding the unmarried son of Respondent as the agent of his father. Thus far then the Defendant would be within his rights and it is for Plaintiff to show that the statement was in fact malicious.

Even assuming that the truth of the statement were not fully established it seems that the Defendant may still avail himself of the protection afforded by the decision that mere carelessness and indiscretion in the manner of making a privileged communication are not alone sufficient to render Defendant liable for damages, Restall vs. Malboch 18 E.D.C. 77, and that honest belief in the truth of the words uttered will ordinarily negative malice even though the words go somewhat beyond the requirements of the occasion. (Cohen vs. Bell, 1910 T.H. 319 - see also Tait vs. Schulz, 1885, 7 N.L.R. 40 and Loveday vs. Lombard, 1896 C.R. 43).

Comments on public acts of public men has received protection greater even than this: "but in setting up the right of fair comment, the Defendant assumes that the matter complained of is defamatory but claims that under the circumstances and as he was not animated by malice towards Plaintiff, he had a right to say what he did say. Only when a person exceeds those limits and does so dolo malo is he liable." - Innes, C.J. in Crawford vs. Albu, 1917 A.D. 102. That case moreover indicates that the trend of recent cases especially

English...../

English decisions - which are relevant - is to regard fair comment as covering imputations of evil motive where such imputations are warranted by the facts truly stated. In the present case the facts would be the establishment of a butchery and the comment in the imputation that it was for the purpose indicated.

The interpretation that may fairly be put on the expression used by Defendant seems to be that Plaintiff had control of trust stock, liable to die from prevailing causes, that Plaintiff established the butchery to convert the stock into cash for the benefit of the Chief (as tribal trustee) and that Plaintiff was now called upon to render an account of the transaction. It is for Plaintiff to show the words conveyed any other meaning injurious to himself and made maliciously. His witness Mgitshwa says "I inferred from Defendant's words that he meant Plaintiff had not accounted for tribal funds."

His other witness Msenteli says "Defendant said 'we thought that you had seen the cattle dying and that you had put up a butcher's shop in order to lift up Mdolomba". I did not think that these words were bad."

Viewing the matter both from the point of view of Native Custom and from that of Common Law these expressions used in the circumstances of this case are not actionable unless Plaintiff can show that they were used in an injurious sense and with express malice.

This he has failed to do. As shown by the foregoing extracts he has in fact merely confirmed the Defendant's case and he must therefore fail.

Appeal allowed with costs and the judgment of the Native Commissioner is reversed to read "for Defendant with costs."

/Both parties in person./

CASE NO 23.

ZAYIYASE NTULI VS. GADHLAMBA MHLONGO.

ESHOWE. 22nd. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Application for extension of time to appeal from a Chief's Court - Section 5, Government Notice No. 2255/1928 - Native Commissioner's discretion - Marriage by Christian rites in Zululand in 1867 prior to annexation - Consequences follow lex loci - Only form recognised was customary union - Subsequent customary unions valid - Costs on higher scale awarded where matter of intricacy and magnitude.

An appeal from the Court of Native Commissioner, Eshowe.

McLOUGHLIN, P...../

McLOUGHLIN, P. (delivering the judgment of the Court):

Zayiyase sued Gadhlamba in the Chief's Court for the lobolo of a girl Manjako and obtained judgment for seven head of cattle and the guardianship of certain children on the 12th. September, 1935.

On the 3rd. April, 1936, Gadhlamba petitioned the Court of the Native Commissioner at Eshowe for an extension of time within which to note an appeal against this judgment.

In his supporting affidavit Gadhlamba alleges that:

(1) Pursuant to the abovementioned judgment writ of execution was issued against him and the judgment and costs satisfied.

(2) That thereafter he instituted action against Zayiyase for the maintenance of the woman Basugile, who is the mother of Manjako, together with Manjako and her illegitimate offspring.

(3) That until then he, Gadhlamba, was unaware that there was any question as to the validity of the union between Basugile and one Isaka, the father of Zayiyase.

(4) That at the hearing of the case for maintenance of the woman Basugile it transpired that Isaka had married as his first wife one Rebeka Ndebele by Christian rites and subsequently had taken other women as wives under Native custom by payment of lobolo, among them the mother of Zayiyase and the woman Basugile.

(5) He therefore contended that these subsequent unions were illegal in view of the first marriage by Christian rites. It followed that the children of the union between Isaka and Basugile were illegitimate and accrued to the family of a former husband of Basugile, one Ndabinjani, whose heir is the Applicant Gadhlamba.

The Native Commissioner's Court duly granted extension of time as prayed and proceeded to hear the appeal.

In evidence the following facts emerged:

1. A certificate, in the form prescribed by Ordinance 17 of 1846, was put in showing that on the 2nd. July, 1867, one Uisaka Ka Umkonto was married to Urebeka Ka Umakamana at the Eshowe Mission Station, in the district of Eshowe, by C.C. Oftebro as officiating minister.

2. That Rebecca (Urebeka) is still alive.

3. The heir to that marriage is one Andries Ntuli who is also alive.

4. Zayiyase is son of Isaka's second wife, the first woman taken by native custom after the marriage with Rebecca.

5. ...../

5. That a marriage by native custom was registered at Mapumulo on 23rd. February, 1911 between Issaka Mkonto Ntuli and Besukile Makoko, divorced wife of Mahlomba, one head being delivered as lobolo.

6. That there were two daughters born of this union between Isaka and Besugile, one being the girl Manjako.

7. That Gadhlamba is the heir to the late Ndabinjani.

The Native Commissioner gave judgment in favour of Gadhlamba, upholding the appeal and setting aside the Chief's judgment with costs, declaring that "as Isaak married his first wife by Christian rites all subsequent unions are invalid and the respondent has no locus standi."

Against this judgment Zayiyase has appealed on the following grounds:-

1. That the judgment is bad in law.

2. That the Acting Assistant Native Commissioner should not have granted the extension of time which he did, in which to bring this case on appeal - the Respondent having accepted the judgment and by reason thereof having commenced another action founded on the said judgment, which he abandoned to prosecute this action on appeal to the Native Commissioner.

3. That at the date of the alleged Marriage between the late Isaac Ntuli and Rebecca there existed no duly appointed Marriage Officers in Zululand, then a foreign country, and the Marriage is not a valid one under the Roman Dutch Law.

4. That in any case Respondent having accepted lobolo for the woman Besukile is now estopped from claiming the property rights in her daughters by the late Isaac.

5. That as between the parties the Appellant has the better right to the lobolo of the said daughters than the Respondent.

The appeal involves consideration of the grounds of appeal in the following order:-

1. That the extension of time should not have been granted to enable Respondent (Gadhlamba) to appeal against the Chief's judgment (Ground No. 2).

2. That the judgment is bad in law. - Ground No. 1. (Grounds Nos. 3, 4, and 5 of appeal are merely an elaboration of this ground).

EXTENSION OF TIME TO NOTE THE APPEAL.

Before arguing on the merits, Mr. Rutherfoord raised verbal objection to the hearing of ground 2 of the appeal in that the appeal against the Native Commissioner's

decision...../

decision granting extension of time for noting appeal against the Chief's judgment was not noted within the statutory period.

Mr. Rutherfoord's objection does not comply with the rules of Court and is therefore invalid.

The position arising is, however, that of an interlocutory order where if an adverse decision of the Native Commissioner would have finally disposed of the matter it would have the effect of final judgment and appeal was the only remedy. Having favourably considered the application the Respondent however, is still entitled to bring the application into issue on determination of the merits, pari passu.

The Native Commissioner indicates in his reasons that he was moved to grant the application because "if the application sought was refused the present Respondent would have suffered an injustice."

This reason does not, however, take the case outside the decision in Cairns' case (Cairn's Executors vs. Gaarn, 1912 A.D. p. 181) with which it has everything in common plus the additional factor that the judgment in the Chief's Court was accepted and acted upon by the Respondent, after being satisfied.

In Cairn's case, the parties remained undisturbed for a period similar to that in the present case, whilst legal opinion was being sought as to Scottish law; which opinion indicated that the judgment was based on a wrong conception of that law. Commenting on this aspect, the Appellate Division in Cairn's case remarked: "the mere fact that subsequently to the judgment appealed against the Courts have come to a different decision on the question of law is not a sufficient ground for extending the time for appealing" (at page 191).

"The object of the rule (requiring the noting of an appeal within a given period) is to put an end to litigation and to let the parties know where they stand. It would be intolerable if there were no reasonable limit of time within which appeals might be brought and it is in the interest of the public that the time should be limited. When a party has obtained a judgment in his favour and the time allowed by law for appealing has lapsed, he is in a very strong position and should not be disturbed except under very special circumstances." (at page 193).

Such special circumstances were held not to exist in Cairn's case. The present case cannot be distinguished from Cairn's case. As already stated the Appellant's case is even weaker than that of the Applicant in Cairn's case. The Native Commissioner has therefore erred in granting an extension of time in which to note an appeal against the decision of the Chief's Court. The appeal must thus succeed on this ground alone.

In view, however, of the consequences of the original decision it seems desirable to this Court to deal also with the first ground of appeal for the reasons which

follow...../

follow/shewill that the Native Commissioner is likewise wrong in his finding of law.

He states in his reasons "the Court following the case of Daniel vs. Hester, 1910 N.H.C. 119 and Stafford's 'Native Law as practised in Natal', page 166 under (3) (Other Civil Marriage), has no hesitation in declaring the marriage (i.e., the marriage of Isaka and Rebecca) to be legal. Though admittedly Zululand was a "Foreign Country" in those days the provisions of Ordinance 17 of 1846 applied for it has been possible to obtain a certificate of marriage taken from the registers which were kept in accordance with the ordinance referred to."

Regarding the subsequent Native unions he adds: "Clearly at the time of his first marriage Isaka had become a Christian and was desirous of being united to his first wife under those rites. Christians do not approve of polygamy and although Law 46 of 1887 which prohibits subsequent polygamous unions was not in force, it cannot possibly be argued that the subsequent unions (polygamous) contracted by Isaka were legal, the Court could come to no other conclusion than that they were illegal and void ab initio."

Unfortunately for the Native Commissioner's logic there is nothing on record regarding Isaka's religious persuasion. The fact that he purported subsequently to contract four polygamous unions would indicate that he certainly did approve of polygamy whether he was a Christian or not.

At the time of the marriage in 1867, Zululand was a 'Foreign" Country governed by Zulu law under a Zulu potentate. The Court has failed to trace any reference in the ordinance itself or in any enactment, treaty or agreement whereby the operation of Ordinance 17 of 1846 then applied to Zulu subjects resident in Zululand although subsequently extended after annexation. The keeping of a register in the form prescribed by the Ordinance is not authority for the Native Commissioner's assumption.

Actually the issue goes far deeper.

In the case of Canham's Executor vs. The Master, 26 S.C. p. 166 the Court dealt with the question of the position of parties married prior to the annexation of an independent Native state: "The marriage took place before the annexation of Pondoland. According to other cases decided by the Courts in dealing with Pondoland, the Court ought to recognise the status which was obtained in Pondoland by these people. These people are still in Pondoland - it is not as though they had come to this Colony (i.e., the Cape Colony proper where at that time Native law and custom was not recognised) and sought the help of the Court here - and on the comity which prevails according to international law when a different government takes over a State, the laws of that State and especially the status of the inhabitants before annexation should be recognised after annexation."

The following extracts from Dicey's 'Conflict of Laws', Fifth Edition, will clarify the position further:-

"A...../

"A marriage is valid when

"(1) Each of the parties has according to the law of his or her respective domicile the capacity to marry the other, and

"(2) If the marriage is celebrated in accordance with the local form." p. 732.

"The law of the country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted." p. 735.
Sotto Mayor vs. De Barros (1877) 3 P.D. (C.A.) 1, 5.

"Whether a religious ceremony is requisite or not depends entirely on the local law and a marriage valid thereunder (i.e. local law) cannot be questioned on the ground that it violates religious principles binding on one or even both of the parties to the marriage." P. 736.

"On the other hand a religious marriage is treated as void if it does not receive recognition under the local law."
Berthiaume vs. Dastous, 1930 A.C. 79, Dicey, p. 736.
Kent vs. Burgess, 1840 11 Sim. 361, Dicey, p. 643.

Applying these rules to the present case the Court finds that under pre-annexation Zulu law the local form of marriage demanded as essentials the payment of lobolo to the parent of the bride, coupled with the transfer of the bride to the bridegroom. Various incidental ceremonies accompanied these essentials. Whatever ceremonies religious or heathen accompanied the transaction there would in Zulu law be no marriage unless lobolo passed. As stated by Dicey, above, 'a religious marriage is treated as void if it does not receive recognition under the local law.'

It is evident from the information of the Court that Zulu law never recognised a religious marriage per se as a thing apart from the ordinary law of the Country. The ceremony conferred in the eyes of the Zulus no greater rights or status on either spouse than the ordinary native marriage. The union of Isaka and Rebecca must thus be viewed from the standpoint of original Zulu law.

The evidence regarding this aspect of the transaction is very meagre. There is no indication that lobolo passed. If none passed, there was no valid marriage according to the lex loci for lack of due formality which the religious ceremony could not rectify.

For the purposes of this judgment it will, however, be assumed that lobolo did pass and that a marriage according to the law of the Country was contracted. If it were otherwise the union would be invalid for lack of formality and the Respondent's case falls to the ground.

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A marriage so contracted at that time would be nothing more nor less than an ordinary native marriage plus some religious ceremony which the local law regarded as superfluous and of no significance in creating new rights, capacities or obligations other than that of an ordinary native marriage contracted without such religious ceremony.

The position created would by the authority of Canham's case be protected on annexation. The union would continue to be nothing more than an ordinary marriage contracted by Zulu law. Polygamy or rather polygyny was and is the recognised national custom of the Country and it continues to be recognised under European control of Zululand and Natal where the parties remained and where the subsequent customary union between Isaka and Basugile was contracted in the form recognised by the law of the land.

The union between Isaka and Rebecca differs from that in the case of Daniel vs. Hester quoted by the Native Commissioner as that was entered into in 1896 when the Country was under British rule and under new laws recognising Christianity and civilised practices.

It has been contended in argument that Section 5 of Act 44 of 1903 is retrospective in operation and that by reason of this retrospection the union between Isaka and Rebecca must be regarded as a marriage by Christian rites coming within the purview of Section 13 of Law 46 of 1887. While possibly it may be conceded that Act 44 of 1903 was intended to be operative retrospectively, although this is not very clearly indicated, such retrospection can affect only marriages contracted by Christian rites when this form of marriage was consonant with the lex loci if only in the form of the Common Law of the power then ruling the land. This could only be subsequent to annexation under civilised control when such marriages did at least conform to the Common Law if not to the Statute Law which for some time was excluded from application to Zululand.

The union between Isaka and Rebecca relied for its validity, if any, on observance of the essentials of a native marriage under Zululand. It never was and could not become a marriage contracted by Christian rites, which the lex loci did not recognise.

On the merits of the case the appeal must succeed and the decision of the Chief's Court restored.

The point has not been raised on appeal but it would be one proper for this Court to take into consideration, that while the evidence refers to the woman Basugile as a widow, the certificate of the record of the customary union between her and Isaka shows her to be a divorced woman.

It is conceded by Counsel that in this event the illegitimate children of Basugile would accrue to the estate of her father and not to that of her previous husband.

In these circumstances Gadhlamba would have no right to the children or the cattle of their lobolo.

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It might, moreover, be contended, although this has not been done at any stage in the proceedings, that as Andries and not Zayiyase is the general heir of Isaka that Zayiyase similarly has no locus standi. It may be possible for Zayiyase as heir of the house to which Basugile was affiliated, to have a right to the stock.

As his locus standi has not been questioned and there is no manifest legal disqualification such as affects Gadhlamba in the position arising from the fact that Basugile was divorced, this Court has attached no consequence to the question of Zayiyase's right to sue.

The result will be that the appeal will be allowed and the judgment of the Native Commissioner altered to read: "The appeal is dismissed with costs." Respondent to pay costs in this Court.

Application has been made for costs on appeal on the higher scale. The case is one of such intricacy and magnitude that the circumstances justify the concession. Costs in this Court will accordingly be authorised on the higher scale.

RIDER BY STAFFORD, MEMBER:

I concur in the finding of my learned brothers in respect of the main ground of appeal, i.e. the validity of the original union between Isaka Ntuli and Rebecca. I wish however to reserve my opinion in regard to the second ground of appeal, i.e. the irregularity of the granting by the Native Commissioner of an extension of time within which to note appeal. There are two grounds on which I feel a certain amount of difficulty in concurring in my brothers' decision in regard to this ground of appeal. These are:

1. That Section 5 of the Rules of Native Chiefs' Courts give the Native Commissioner a discretion in regard to the granting or refusing of an application for an extension of time in which to appeal and having exercised his discretion judiciously in this matter this Court is not entitled to upset the decision of the Native Commissioner.

2. That Cairn's case on which my brothers rely was one in which merely personal rights were in question. In the present case the question goes deeper and affects the personal status of several persons. Their status was dependent on the finding as to the validity of the various unions and to have refused to reopen the case would have left the status of the children in doubt. Cairn's case was merely concerned with the question of the extension of time for appeal, in a case in which personal rights only were in dispute. Section 5 of the Rules of the Native Appeal Court also specially excludes pre-emption of appeal and this should and probably did influence the Native Commissioner and may have been introduced to meet just such a case as Cairn's.

As this case is being decided on the main issue I do not feel that I am called upon to decide on these two points but merely to express my doubt as to the correctness

of...../

of the finding of my learned brothers in their decision. I reach this conclusion because this particular ground of appeal was not the main ground and was not fully argued.

For Appellant: Mr. H.H. Kent of Eshowe.

For Respondent: Mr. P.B. Rutherfoord of Eshowe.

CASE NO. 24.

BONGA MASIKANE VS. MPIPAMBI MASIKANE.

ESHOWE. 23rd. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Presumptions - Ownership of gifted kraal property - To junior house - Ukezo.

An appeal from the Court of Native Commissioner, Nkandhla.

STAFFORD, Member, (delivering the judgment of the Court):

Plaintiff and Defendant are half brothers. Defendant's mother's hut was the "indhlunkulu" and Defendant is the general heir of his late father Bayekana. Plaintiff is the son of a junior wife who was affiliated to the "indhlunkulu" hut.

After the marriage of Plaintiff's mother a cow was handed over to her to milk. This beast and its progeny remained at her kraal which had separated from that of the "indhlunkulu" until Bayekana's death. Plaintiff alleges that the cow was bought with the personal property of Bayekana. The Native Commissioner found as a fact that it was bought with kraal property - in either case the position would be the same. This is not rebutted by Defendant.

The whole point in dispute is whether the cow was gifted to Plaintiff's mother or whether it was simply a loan. The term "ukezo" although not used in the summons was introduced in the evidence. The term usually refers to a beast gifted by the girl's father. In this case it is admitted it did not come from the father but the husband. The term has been used loosely and we are not called upon to decide on the custom of granting an "ukezo" beast. The Native Commissioner has found that it was a gift and not a loan and we think he is correct for the following reasons:-

1. Being kraal property, the presumption is that it was a gift rather than a loan, as this would be in accordance with a recognised practice - see Bahube vs. Mnukwa, 1911 N.H.C. p. 217; Kleintjie Ntamana vs. Mtshayeli Nkosi, N.A.C. (N. & T.) 24/7/35.

2. The cattle and all the increase were actually taken to and kept at Plaintiff's kraal and this facts lends colour

to...../

to the aforegoing assumption and moreover the presumption of ownership is in favour of the kraal where the cattle are found (see cases quoted by Stafford on page 53).

There is evidence of such a gift having been made and for this reason coupled with the presumption mentioned above, we are of opinion that Plaintiff has established his case.

The appeal will therefore be dismissed with costs.

For Appellant: Mr. P.B. Rutherfoord of Eshowe.

For Respondent: Mr. H.H. Kent of Eshowe.

CASE NO. 25.

PHILIP JELE VS. NDANDOWA SIBIYA.

ESHOWE. 26th. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Lobolo - Section 15 of Zululand Code of 1878 - Christian marriage - Recovery of lobolo after dissolution of marriage - Sections 11 of Act 38 of 1927 and 83 of Natal Code of Native Law, Proclamation 168/1932.

An appeal from the Court of Native Commissioner, Empangeni.

McLOUGHLIN, P. (delivering the judgment of the Court):

The action is for the return of fifteen head of cattle being lobolo paid for the daughter of Defendant whom Plaintiff had married by Christian rites in October, 1929. On 12th. July, 1935, Plaintiff obtained a provisional order of divorce against his wife on the grounds of desertion. The order became final three months later. On July 15th., 1936, Plaintiff issued summons for the return of the cattle paid.

Defendant by his attorney objected to the summons:

1. That the claim is bad in law.

2. Plaintiff drove his wife out of his kraal and has no claim for the return of lobolo.

It is common cause that the marriage was consumated.

The Native Commissioner upheld the first objection and dismissed the summons.

In his reasons the Native Commissioner judicates that his judgment was based on the following findings of law which, however, are not set out specifically as such:-

(1)...../

(1) The marriage took place in 1929, their (the parties') position being defined by the Code of 1878.

(2) Between 1.1.29 and 1.11.32 when the 1891 Code as amended became operative in Zululand by virtue of Proclamation 168 of 1932, Native Law and Custom remained undefined.

(3) The rights of the parties in the matter are regulated by the law or custom prevailing at the time and place of solemnization of the marriage.

(4) The Code of 1891 did not apply.

(5) The new Code was not in pperation then.

(6) The repeal of the Code of 1878 did not repeal Zulu law and custom.

(7) Despite its repeal the laws and customs defined by the 1878 Code were accepted and administered in all Zululand Courts until 1.11.32 i.e., the repealed Code remained in operation notwithstanding its repeal.

(8) Therefore the custom or law related in Section 15 of the Zulul nd Code of 1878 still prevailed.

(9) That law effectively bars the claim of Plaintiff, as the rights of the parties were defined by the law or custom prevailing at the time of marriage. The Native Commissioner has misconceived the legal position.

The rights flowing from a marriage are the rights affecting the spouses themselves in their status, their property, the right of donation and like matters. The rule does not affect third parties other than the children of the marriage. As between the husband and the father-in-law the rule has no meaning nor application.

Lobolo is paid under Native Custom and must be dealt with under that custom. It is a thing apart from the Christian marriage - Gede Nzimande vs. Mvelapantsi Dhlamini, 1935 N.A.C. (T. & N.) 18.

By Section 11 of Act 38 of 1927 the Court is bound to deal with lobolo as a valid Native custom.

Cases which arose prior to the application of the Codes are dealt with under pure Native Law. That law will also be in full operation during the period 1.1.29 and 1.11.32 when no Code was in force. The Code of 1878 was specially repealed as from 1.1.29 and none of its restrictions and variations from the original custom were applicable during that period.

It was contended by Mr. Glenny that by operation of Section 13(3) of the Interpretation Act of 1910 the Code of 1878 remained in operation until the substitued provisions came into force when the new Code of 1932 was promulgated.

The...../

The argument is based on false premises.

By Section 36 of Act No. 38 of 1927 as applied by Proclamation 296 of 1928 the Code of 1878 was repealed and by Section 11(1) of the Act, Native Law was substituted for the repealed Code. These provisions came into operation immediately, thus no reliance can be placed on this section as authority for retaining the provisions of the 1878 Code.

Under original Native Law, which is now recognised in the Code of 1891 and in the new Code, lobolo is recoverable.

The matter is, however, simply solved by the application of the following legal rules which are in point:-

(1) The contract of lobolo is between husband and father-in-law.

(2) The claim for recovery does not arise until dissolution of the marriage if by Christian rites. - Stafford, p. 168.

(3) The order of divorce became final three months after the 12th. July, 1935.

(4) The claim which then arose is subject to the law of procedure then in force.

(5) On that date, viz: 12th. October, 1935, the new Code was in operation and by Section 83 thereof Plaintiff acquired a right of action.

Whatever doubt may exist, although this Court has none, that there is a cause of action which can be enforced, is dispelled by the rules of interpretation of statutes. Any Act which affects procedure as distinct from vested rights, is taken to be retrospective in its operation unless the contrary intention is expressed in the enactment. - Maxwell, Interpretation of Statutes, Seventh Edition, p. 195. Section 15 of the 1878 Code was merely a bar which has since been removed. Hence a claim for the recovery of lobolo preferred in July, 1936, may be heard under the procedure then in force.

The appeal will accordingly be upheld, with costs. The judgment of the Native Commissioner is set aside and the case returned to be heard on its merits.

For Appellant: Mr. H.H. Kent of Eshowe.

For Respondent: Mr. D.J. Glenny of Empangeni.

1938 (N) 31.
1941 ") 8.
1943 ") 57.

CASE NO. 26.

MSHUMBI SITOLE VS. MALI SITOLE.

ESHOWE.. 26th. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Deathbed dispositions of kraal property - Absence of general heir - Recognised formalities on verbal testation by kraal head essential - Departure from custom raises doubts as to bona fides.

An appeal from the Court of Native Commissioner, Mtunzini.

McLOUGHLIN, P. (delivering the judgment of the Court):

The appeal is against the decision of the Native Commissioner reversing the judgment of a Native Chief's Court.

Mali Sitole sued his younger brother in the same house (the indhlunkulu) for 20 goats which he had appropriated alleging an allocation of these goats in his favour by his father just before the old man's death.

The Chief gave judgment in favour of Defendant (Mshumbi Sitole) for the goats holding that the alleged gift had been made.

The Native Commissioner upheld an appeal from this decision and gave judgment for Plaintiff (Mali). He held that the gift was illegal being made mortis causa and therefore contrary to law as decided in the cases:

(1) Majwili Ndabezita vs. Langalibalele Ndabezita, 1924 N.H.C. 33.

(2) Mkulunyelwa Zikalala vs. Mzama Zikalala, 1930 N.A.C. (T. & N.) 139.

(3) Mkuluzi Mpungose vs. Siposo Mpungose, 1933 N.A.C. (T. & N.) 11.

Dealing first with the facts of the case, it appears that six days before his death the father of the parties, one Gibinyongo in the presence of the Defendant, Bakipini the brother of Gibinyongo, and one Mdakabomvu the medical attendant of Gibinyongo purported to distribute certain goats among four junior sons.

It is important to note that Bakipini resides at the kraal of Gibinyongo and has done so all his life. Mdakabomvu states specifically that he was present, having been called to attend to Gibinyongo and not for the disposition. Defendant alleges that he was specially sent for. Plaintiff was in Johannesburg and apparently was sent for only after his father's death.

In the presence of these people, it is contended by Defendant that Gibinyongo apportioned the bulk of the goats belonging to him. It is common cause that these goats were kraal property and that Plaintiff is the Indhlunkulu and general heir.

It is contended by Defendant that some of the animals were there and then earmarked by Gibinyongo who could not complete the task owing to his illness. He died soon after

but...../

but before completing the earmarking and at the funeral Bakipini announced the disposition to the other brothers of Gibinyongo who at once objected to any tampering with the estate until Plaintiff arrived. He came back from Johannesburg and immediately resisted the claim. He found all the goats claimed had been earmarked and ejected Bakipini from the kraal objecting to him exercising control over the estate.

The witnesses Bakipini and Mdakabomvu alleged that there were present also the other three sons of Gibinyongo who were benefiting. Defendant states all his father's sons were present except Plaintiff, when his father died but he apparently excludes them from those present at the disposition.

The judgment of the Native Commissioner is attacked as being contrary to law. The law of the subject is summarised in the cases referred to by the Native Commissioner.

In Zikalala's case this Court held that "Dispositions made by a kraal head on his deathbed must be considered as binding for he is the undisputed sole owner until he dies." - p. 142.

It was contended by Hignett, J. in Ndabezita's case that this bald statement of the position must be qualified by consideration of the claim of the general heir. - (p. 38). The right of testamentary disposition has since been accorded the kraal head in respect of kraal property and the legal background thus differs. Nevertheless the general conclusions still hold good, viz: that the general heir as residuary heir to kraal property has an interest therein. That it is the accepted principle of Native Law that the <u>status quo</u> should not be disturbed except in accordance with recognised formality "The kraal head cannot by means of a secret disposition baulk the heir of his just inheritance." - p. 38. "It is a settled principle in our Courts that the administration by a kraal head must be carried out in such a manner, that any one house or section of a kraal cannot be enriched at the expense of another; and to this end it is in accordance with Native custom and usage that in dealing with the allocation of kraal property such should be publicly declared.

"The terms 'publicly declared' is used rather in relation to the inmates of the kraal than to those outside the family circle; and the intention is twofold. (1) That there may be ample evidence of the fact of such allocation, and the manner of its readjustment, and (2) That the heir or heirs affected thereby should have due notice and full opportunity to put forward any objection against same" - ibid. p. 38.

It is true that the majority of the Court took the view that in that case the disposition should stand because (1) the plaintiff (the general heir) was present at the transaction (2) that for four years thereafter he stood by and not only allowed the recipient to deal with the stock as owner but acknowledged the right in obtaining his permission to use the stock. Nevertheless the remark was made by Mr. Justice Leslie, one of the majority, that "Had he taken up that attitude (i.e. that the disposition was invalid) at the outset and acted consistently in that respect he must have succeeded in his action."

In...../

In Zikalala's case "Both parties were present at the transaction. The other members of the family were also present and a neighbouring kraal head heard what was said."

The present case differs in that the general heir was not present and in that the members of the family actually in attendance were, with one exception, those benefiting under the disposition although others were in the vicinity.

Neither Native law nor Common law looks kindly on unattested acts especially dispositions of property by a man in extremis. The scope for fraud is great. Consequently while both Native Law and Common law admit the right to such dispositions both require clear proof to be given by the claimant to establish a claim made in a deceased estate. - Mnyameni Msweli vs. Mlondolozi Msweli, 1934 N.A.C. (T. & N.) 85; Savory vs. Gibbs, 20 C.T.R. 600.

In the present case there is considerable doubt as to the bona fides ofthe claim. The deceased had already provided lobolo for the Appellant. The alleged disposition appears to have greatly depleted the estate of goats.

There has moreover been little proof of attestation - the word is used in the sense that certain individuals of a family are regarded as necessary witnesses - just as in Common Law. In a weighty transaction such as alleged by the Appellant independent senior members of the family are usually present. They were available but were not called to be present on the occasion of the allocation.

The announcement at the funeral is itself a departure from custom which increases the doubt regarding the bona fides of the parties to the transaction. Estate matters are not usually discussed at a funeral and usually not in the absence of an adult heir. The manner in which the remaining goats were earmarked is also contrary to custom. These facts have not been satisfactorily explained by Appellant.

It must be emphasised that this is not a matter of a gift of an odd beast or so to start a herd but a wholesale disposition of the property which would have accrued to the general heir to enable him to discharge the obligations placed on him by custom.

While then acknowledging the right of verbal testation in kraal property by a kraal head in accordance with the Code and with Native custom, this Court feels that the act in the present case has not been sufficiently authenticated and the claim of the Appellant cannot be conceded.

The appeal should therefore be dismissed with costs.

Costs on the higher scale were asked for by Counsel but the Court is not satisfied that the circumstances warrant the order.

For Appellant: Mr. H.H. Kent of Eshowe.

For Respondent: Mr. A.C. Bestall of Kranskop.

CASE...../

1945 (T+N) 117.

CASE NO. 27.

BELLINA NGWANE VS. AMBROSE NZIMANDE.

DURBAN. 29th. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Damages: Quantum of - Marriage - Breach of promise - Exempted Native woman.

An appeal from the Court of Native Commissioner, Pinetown.

McLOUGHLIN, P. (delivering minority judgment):

Plaintiff sued Defendant in the Native Commissioner's Court at Pinetown for:

(a) £100 as damages for breach of promise.

(b) £5 being value of articles purchased by Plaintiff in preparation for the marriage.

(c) £100 as damages for assault.

(d) £3.15.0. medical expenses resulting from the assault.

(e) Costs and alternative relief.

The Native Commissioner awarded the following amounts:-

On claim (a): £5.

" " (b): Nil.

" " (c): £2.

" " (d): £3.15.0.

with costs.

Plaintiff has appealed against the quantum of the awards in (a), (b) and (c) on the ground that they are inadequate.

The following facts are common cause:-

(1) Plaintiff is a Native woman exempted from the operation of Native law - and a spinster. Her exemption is derived from that of her father by endorsement.

(2) Defendant is a school teacher in Government employ.

(3) That the Defendant promised in or about July, 1933, to marry the Plaintiff.

(4)...../

(4) That a disturbance took place on 27th. November, 1935, at the Umlazi Mission Station wherein Plaintiff was injured.

It is alleged by the Plaintiff that on that occasion she had parted from Defendant after a visit by him and that attracted by a whistle commonly used by Defendant she had followed him to find him lying on the ground with one Ndande, a teacher at the Umlazi School, in suspicious circumstances, that she had thereupon taxed him with infidelity and upbraided him and that he thereupon assaulted her by hitting her with his fist and by twisting her arm causing injuries which necessitated confinement to hospital for nine days at the cost set out in Claim (d).

As a result of this disturbance Defendant wrote to Plaintiff a letter on the 30th. November, 1935, "wrongfully and unlawfully notifying the Plaintiff that he refused to marry her."

Dealing with the finding on the claim for damages for the assault the Native Commissioner accepted the Defendant's version that Plaintiff was the aggressor and that he, Defendant, intervened to prevent an assault on the woman Ndande. He is borne out in this finding by the facts especially the incident of the Plaintiff pursuing the girl Ndande to her quarters despite the allegation by the Rev. Steele that she (the Plaintiff) appeared that night in "a damaged condition, hysterical, crying and evidently in great pain." Defendant admits catching hold of her but denies that he assaulted her and alleges that the resulting injury to her shoulder was caused by Plaintiff attempting to wrench herself free from him to pursue Ndande. The Court sees no reason to disagree with this finding and would have been prepared to agree with a finding of absolution on this claim. The award has, however, not been attacked and it will therefore be allowed to stand.

The claim (b) for the value of the articles bought in contemplation of the marriage can be sustained only on proof that Plaintiff has incurred loss.

Van Zyl, Third Edition, Vol. II. p. 588 says "the aggrieved party may recover the amount of any actual expense he or she may have been put to in making the necessary arrangements or preparations for the marriage" but this proposition is too widely stated and is in conflict with the general rule that no one can enrich himself at the expense of another. The claim is one for special damages which must be proved.

The articles purchased for the £5 claimed appear all of them to be articles of every day use and are thus not a loss to the Plaintiff who claims to be living on a higher standard than usual.

Accordingly the finding of the Native Commissioner on this claim will not be disturbed.

In regard to Claim (a) the amount awarded as damages for breach of promise, my brothers differ from me on the quantum of damages awarded and it becomes necessary to review the matter rather fully to ascertain whether or not the Native Commissioner has exercised the discretion

vested...../

vested in him in such matters in a manner which calls for intervention by this Court on appeal. If he has not been unreasonable this Court should hesitate to upset his finding, although it feels that had the case been one of first instance it would have given a somewhat larger award.

We agree that the Defendant is responsible for the breach, and that it was made not only without just cause but deliberately designed.

Dealing now with my own views on this aspect, the Appellant (Plaintiff) alleges that the award of £5 "was inadequate having regard to the Appellant's status and conditions of living and to Respondent's position."

Counsel for Appellant emphasised the status and conditions of her people and asked the Court to hold that because she and her parents were exempted Christianised Natives Appellant was entitled to higher damages. This idea of a distinction of class is not uncommonly held, and was indeed enunciated by this Court in the case of John Nzalo vs. Lilian Maseko, 1930 N.A.C. (T. & N.) p. 41 where it was held that "Natives living in large industrial centres as these (the parties) do and having become detribalised and adopted standards of living and outlook of the more enlightened classes are to be regarded in a light wholly different to the primitive order of society of the kraal.

Counsel for Appellant had to concede in argument that such a distinction is not supported by the Common law under which Plaintiff claimed.

This Court cannot subscribe to any decision based on such class distinction for it is manifestly unsound. In itself, neither education, religion, nor exemption from a particular law nor residence in urban areas results in any measure of uniformity in attaching a higher legal value in questions affecting damages. It is not a question of a class distinction but purely a personal matter varying with each individual and the other party to the suit, and with the circumstances of each case. Despite the so-called civilised condition members of these classes may be so depraved in their conduct as to deprive them of any standing in the eyes of the law.

Without any education, or religion or even exemption the daughter of a duke's gardener is entitled to special consideration if jilted by the duke's son.

Neither her title nor education will help the duke's daughter to obtain higher damages than a girl of ~~her~~ her own social standing if the gardener's son breaks his promise to marry her.

That sums up this claim.

Van Zyl states "The action for damages for breach of promise to marry is for compensation for loss of comfort or social position, or as some writers put it, for the value of the match to the person disappointed."

"The amount to be awarded is entirely in the discretion of the Court who must be guided by the circumstances of each

case,...../

case, the social position of the parties and the pecuniay means of the offender." Third Edition, Vol. II. p. 588.

This Court has indicated in the case of Johannes Keswa vs. Mafutshana Mabanga N.A.C. 10/7/33, that the fact that an unexempted Native was married by Christian rites does not give him the right to claim higher damages than a man married by Native custom. My brother Stafford states in his learned work on Native Law at page 130, that this is due to the fact that the marriage by Christian rites doesnot remove the parties from the operation of Native Law (Section 11 of Law 46 of 1887) and adds a rider.

But the matter goes deeper than this as the foregoing reasons indicate. The Transkeian Courts have similarly held that a teacher as such was not entitled to higher damages (2 N.A.C. 36).

I am of opinion that it is not desirable and in fact misleading to lay down a general rule to the effect that higher damages accrue to a particular class of Native merely by reason of emancipation or of education or the like.

Each case must be dealt with on a personal basis, individually.

In the present case under this test the Plaintiff is immediately met by the objection that her marriage with Defendant would result in the loss of her exempted status and a lowering (if such an expression be applicable) to that of Defendant. - See Section 25 of Law 28 of 1865. His present position must be regarded for the purposes of this case not his future possible status. Actually under the new Exemption regulations he and she would retain their subjection to Native law to some extent. - Government Notice No. 1233/1936.

There is no evidence on record of the pecuniary means of the Defendant, nor is there anything to guide this Court regarding the age and appearance of the Plaintiff, all factors involved in assessing her chances of getting another husband. That she is young may be assumed. Few Native women remain single and the Court is justified in accepting the evidence of her witness Rebecca that prospects of marriage are not negligible.

The position is thus that as far as Defendant is concerned there is nothing, short of punitive damages which this Court is not entitled to impose, that can be relied upon to justify any special consideration. As an unexempted Native Defendant would not be exposed to any action for breach of promise by another unexempted Native female, Jimsoni vs. Lubaca 1920 N.H.C., as the action would have to be tried by Native law (MacCullum Kambule vs. Mfred Kunene, 1932 N.A.C. (T. & N.).

If then the Plaintiff was prepared in marrying the Defendant to accept this position it seems difficult to reconcile her claim for special consideration on the grounds that her status and that of her father govern the question.

If it be the case that she occupies a superior status now, the value of the marriage to her could not have

been...../

been as great as one with an exempted Native; in other words the Native Commissioner is correct in holding that "the engagement was no more important, in the eye of the Native public than that of any other educated couple."

I am therefore of opinion that Plaintiff has failed to show that the amount awarded her by the Native Commissioner is so unreasonable that this Court should intervene to increase it.

I hold that the appeal should be dismissed with costs.

Judgment by PINKERTON and STAFFORD, Members of Court.

Per STAFFORD (delivering majority judgment):

The facts in this case have been fully set out by the learned President and there is no necessity to review them. In so far as claim (c) in respect of the goods purchased by Plaintiff in anticipation of marriage, and also in regard to the claim for assault under (b) are concerned, we are agreed that the appeal should be disallowed. We are further agreed that Plaintiff has established a right to sue for damages for a breach of promise of marriage. We only differ in regard to the extent of the damages awarded. The learned President contends that the damages awarded are not so inadequate that this Court, sitting as a court of appeal, should reduce them.

My brother Pinkerton and I cannot subscribe to the reasoning of the learned President that the status of the parties cannot affect the measure of damages. We concede that a court cannot lay down any arbitrary rule that exemption from Native law would of itself entitle Plaintiff to a higher degree of damages, neither would the mere fact of being school teachers have that effect. As Van Zyl, page 58, says, each case must be treated on its merits.

In dealing with the merits of this particular case, we cannot, in seeking to assess an equitable amount of damages, ignore the fact either of exemption or of the social position of the parties. Education, for instance, must favourably affect the earning capacity of the Defendant.

Damages in a case of this nature cannot be calculated on a mathematical basis, and it is only when one views the position as a whole that one can assess damages.

It has been argued that Plaintiff was willing to forego the status conferred on her by her exemption in that she was willing to marry an unexempted Native and so lose that status. It must be remembered, however, that one object of exempting Natives was to try and raise them up to a higher standard of civilisation. Exemption was not the only road to attaining this higher status which could just as readily be attained by a Native's own voluntary action through education. The Defendant was a school teacher; he was educated and he conformed in every way to those standards which applied to exempted Natives. His position was such that he would have had no difficulty in being granted exemption.

Viewed from the point of view of financial and social loss, Plaintiff has beendeprived of a marriage which would have given her a better position than she may subsequently acquire if she has to accept a husband who does not possess either...../

either the social or money earning capacity of the Defendant.

Under Native law a breach of promise of marriage is unknown, and the Plaintiff is only entitled to her remedy by reason of her exemption; in short her claim is based on the common law, and so all rights and the measure of damages which might arise under Native custom must be ignored. There is thus no guide under Native custom to assist us. It would be misleading to compare such a claim as this with a seduction claim under Native law, as in the latter case the claim lies at the instance of the girl's father and not of the girl herself and is based entirely on the loss which he and not his daughter suffers through the reduction of her marriageable value. We have therefore to fall back to common law and to give as equitable an assessment as is possible, having consideration to all the circumstances of the case.

Viewed broadly under the common law and taking cognizance of the social position of the parties and the potential money-earning capacity of the Defendant, my learned brother Pinkerton and I are of the opinion that the measure of damages is inadequate. We consider that £10 would in all the circumstances have been a fair award and the appeal will accordingly be allowed with costs and item (a) of the judgment will be amended to read £10 instead of £5. The order of this Court will therefore be: Appeal allowed with costs and the Native Commissioner's judgment is hereby amended to read: Judgment for Plaintiff for £15.15.0. being damages £10 in respect of claim (a), £2 in respect of claim (b) and £3.15.0. in respect of claim (d) and costs.

For Appellant: Mr. D.G. Shepstone.

For Respondent: Mr. E.J. Higgs.

(1937 (T&N) 74.

CASE NO. 28.

HLABEYAKE & MASUKU VS. MBAWOTSHI ZONDA.

DURBAN. 29th. October, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Procedure - Irregularity in noting appeal punished by no order as to costs - Hearing of appeals from Chiefs' Courts by Native Commissioner - Procedure on rehearing the appeal: Government Notice 2255/1923.

An appeal from the Court of Native Commissioner, Ndwedwe.

McLoughlin, P. (delivering the judgment of the Court):

This is an appeal from the decision of the Native Commissioner's Court upholding a judgment of a Chief's Court awarding Respondent who was Plaintiff in the Chief's Court a sum of £7.10.0. for three hides which had been left with Defendant to be brayed.

The...../

The evidence discloses that some years ago the hides, four in number, were deposited at Appellant's kraal by the women of Respondent for the purpose stated; that Appellant demurred at preparing them until payment had been made. Some time subsequently by arrangement one hide was prepared the others being left until they eventually rotted. It was contended by Respondent that he had told Appellant that time was important but all the evidence goes to show that this happened shortly before the matter came to Court.

Whatever might have been said for Appellant regarding his non-liability, has been taken away by his admission that he was liable for three raw hides. The value of these the Court places at 10/- each.

The Court cannot uphold the Respondent's contention that he is entitled to damages. None have been proved as should be done in a case such as this, which is based solely on contract, the rule enunciated in Hayward vs. Berlin, 1914 E.D.C. p.64 being applicable.

As Appellant's admission was not accompanied by tender it does not affect costs in the lower Court as was contended by his Counsel.

The appeal will accordingly be allowed and the judgment of the Native Commissioner altered to read: "For Respondent for £1.10.0. with costs for Appellant."

To mark the Court's displeasure of the irregularity in noting the appeal it will order that there be no order as to costs in this Court.

The Court feels it incumbent to remark on the irregular manner in which the appeal from the Chief's decision was dealt with in the Native Commissioner's Court.

There is nothing on record to show what the claim was in the Chief's Court, nor any indication of the Chief's judgment or his reasons therefor as is required by the regulations (See Government Notice No. 2255/1928).

The Native Commissioner has failed to observe the directions contained in Section 8 of the same regulations as elucidated in this Court's judgment in the cases of Charlie Nxele vs. Lemfana Nxele 1930 N.A.C. p. 111 and Yubete vs. Boniface Mkize 1934 N.A.C. (T. & N.) p. 25.

He should hear the case as an appeal but follow the practice as in hearing a case of first instance based on the original cause of action in the Chief's Court i.e., that the Plaintiff in that Court mustlead in the Native Commissioner's Court if the onus be upon him. The practice of calling on the Appellant to lead in the Native Commissioner's Court is incorrect if it happen as in this case that Appellant was Defendant in the Chief's Court and the onus was on Plaintiff.

The Registrar is directed to bring these remarks to the notice of the officers concerned.

For Appellant: Mr. R.G. Mathias of Durban.

For Respondent: Mr. P.A. Donnelly of Durban.

CASE...../

CASE NO. 29.

PIKA NKOMO VS. MFANAWENKOSI CELE.

PIETERMARITZBURG. 2nd. November, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Interpleader - Attachment by Chief's messenger in another Chief's ward in absence of process-in-aid illegal - Section 2, Government Notice No. 2255/1928 and Section 12 of Act 38 of 1927.

An appeal from the Court of Native Commissioner, Ixopo.

McLOUGHLIN, P. (delivering the judgment of the Court):

The action is an appeal from the decision of the Native Commissioner in favour of the Claimant (Respondent) in an interpleader arising out of an attachment under a writ issued on 19th. June, 1936, by way of process in aid to enforce a judgment obtained in a Chief's Court in 1933.

Under the Chief's judgment the present Appellant Pika (the judgment creditor) accompanied the Chief's Messenger to a kraal of the debtor in another Chief's ward and there attached certain stock, including the three in dispute, without having first obtained process in aid from the Native Commissioner concerned. The Messenger handed the stock over to the Judgment Creditor who left them in the care of a man named Dineli and went to work soon after. In the meanwhile the Judgment Debtor on advice of the Clerk of the Native Commissioner's Court informed the Chief that the wrong cattle had been attached as judgment had been for specific cattle, the lobolo of a girl. Thereafter the Chief caused the cattle to be returned to the debtor, in the absence of the creditor and on the understanding that the matter could be further considered on the return of the latter.

Subsequently the cattle were attached in the possession of the debtor at the instance of a man Mankwenkwana on a judgment against the same debtor, who appealed against that judgment, whereupon Mankwenkwana abandoned his judgment and released the cattle.

Thereafter the debtor sold the three head in dispute to the Claimant retaining possession.

It is fairly clear that the transfer to Claimant took place after release by Mankwenkwana and before attachment under the present writ in July, 1936.

Subsequent to this the creditor took steps to attach cattle in the possession of the debtor firstly through the medium of the Chief's Messenger and then by a writ obtained under process in aid granted by the Native Commissioner.

On 30.6.36 the Messenger of the Native Commissioner's Court attached three head of cattle at the kraal of the debtor leaving the three head in dispute at that kraal. These were subsequently attached under the same writ on 7th. July, 1936. Claimant interpleaded.

This...../

This Court takes the view that the first legal attachment of the cattle in dispute took place on the 7th. July, 1936 and the rights of the parties at that date must govern the decision. At that date the cattle had been sold and dominium transferred to the Claimant, although still in possession of the debtor.

Counsel for Appellant (Pika) contends that the first attachment by the Chief's Messenger is to be regarded as valid and that the dominium was vested in the Appellant (i.e. Judgment Creditor) by transfer after that attachment; that subsequent dealings in these cattle conveyed no rights whatever to any other person especially those claiming through the Judgment Debtor. He contends that whatever defect, if any, was caused in the proceedings by an attachment outside the area of jurisdiction of the Chief's Court is cured by the "omnia praesumuntur" rule and the decision in Ross vs. Beyers 1920 O.P.D. 147 and that the proceedings in the attachment cannot be questioned by the Claimant or this Court. Indeed they can be upset only by one of the parties to the suit. Counsel for Respondent relies on the "Res inter alios acta" rule i.e., that a thing done between two parties ought not to prejudice a third party.

This rule is not truly in point as the claim is through one of the parties and therefore limited by the rights possessed by that party.

This Court however takes the view that the proceedings in the attachment by the Chief's Messenger in another Chief's ward in the absence of process in aid is illegal. - See Section 2 of Government Notice No. 2255/1928 read in conjunction with Section 12 of Act 38 of 1927.

The Chief's jurisdiction is limited to persons resident within his area of control and does not extend either to persons or property in an area outside that territory. A Chief has no authority to give his neighbour's Messenger the right to attach property in his area. It can only be done in terms of Section 2 of Government Notice No. 2255/1928 after process in aid has been granted by the Native Commissioner.

The Appellate Division in Cape Dairy and General Livestock Auctioneers vs. Sim, 1924 A.D. 167 held that the Court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties.

The position in the present case is far stronger for the Respondent did in fact raise the question of illegality in the Court below, but was overruled. Counsel has repeated that objection and this Court on the authorities must uphold the contention that it can and must take cognisance of the irregularity in attaching without warrant in a neighbouring Chief's ward - an act rendered void for lack of legal sanction.

The "omnia praesumuntur" rule is in any event a rebuttable presumption and in the present instance the facts clearly rebut any presumption that the acts of the Messenger were legal and transferred rights of ownership to the Appellant (the Creditor). For instance, had the seizure of the stock been resisted by the debtor no action could have been taken against him.

If...../

If the right of the creditor is based on this first attachment he is clearly wrong in his subsequent procedure in reattaching the stock; his action if any is rather a vindication of his right of ownership.

He has by this course confirmed the impression left by his conduct that he had abandoned whatever rights he may have acquired under the earlier proceedings.

He stood by while dealings took place on these cattle. His witness Dineli shows that he was at home and knew before 4.6.35 that the cattle of first attachment had been returned. He himself says he was away only ten months - and thus home even earlier. He took no action then to recover the cattle first attached. He knew of the attachment by Mankwenkwana. His evidence clearly shows that he did not then regard himself as owner of these cattle.

"If Mankwenkwana had slaughtered any of these cattle "I would have sued Gayede (the Judgment Debtor) to replace "them. If the cattle had remained at Mankwenkwana's I would "have attached any cattle at Gayede's that I could have found "at Gayede's kraal to replace those at Mankwenkwana's."

The first attachment was never submitted to by the debtor. This Court cannot accept the decision in Ross' case above quoted as authority applicable to the facts of this case.

There was in its opinion one legal attachment at a time when ownership vested in the Claimant and the appeal must therefore be dismissed with costs.

For Appellant: Mr. H.L. Bulcock.

For Respondent: Mr. G. Masson.

CASE NO. 30. '745(T+N)28.

NQATSHANA SITOLE VS. MKAKENI SITOLE.

PIETERMARITZBURG. 3rd. November, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Adultery - Damages - Right to claim - Liberal interpretation of Section 138 of the Natal Native Code - Adulterer not protected by proviso to the section in certain circumstances.

An appeal from the Court of Native Commissioner, Vryheid.

McLOUGHLIN, P. (delivering the judgment of the Court):

The case turns on the interpretation of Section 138 of the Code.

After hearing Plaintiff and elucidating the facts that Plaintiff and his wife had been living apart for two years, that the estrangement was caused by Defendant and that he sought to marry her and did in fact commit adultery with her being caught in the act some 21 months after the woman had left her husband, the Native Commissioner upheld an objection in bar under Section 138 of the New Code.

The proviso to Section 138 bars an action if the spouses are not living together as man and wife.

The appeal is on the ground that the adulteror is not protected by the proviso if he had knowledge of the subsistence of the marriage.

The Court does not accept this view in the form presented. It is conceded by Counsel for Respondent that the proviso should not be literally construed especially in cases where the spouses, although not living together, are nevertheless still observing the bond of marriage, i.e. they are living in different places but separated in circumstances not amounting to a desertion which would give rise to an action for restitution of conjugal rights.

The Court interprets the proviso in the light of the decisions that special circumstances do justify a construction more liberal than a literal reading would imply.

Each case must be treated on its merits and various factors considered. No general rule can be laid down but the main consideration should be given to the conduct of the spouses and to the behaviour of the adulteror. In other words the question of contributory negligence on the part of the innocent spouse should definitely be a deciding factor.

For example, -

(a) An apathetic or a dilatory husband would be met by a just bar to his action.

(b) An errant wife would not be given licence to licentious conduct at her free will.

(c) A designing scoundrel would not be protected by the bar.

In the light of the foregoing the Plaintiff must be allowed to bring his action against Defendant. If a satisfactory case can be established to show that he is to blame for the state of affairs he complains of he must fail by application of the bar. Otherwise, allowing a measure of latitude given him by Section 78 of the Code or by Section 1 of Law 13 of 1883 (Natal) within which to take steps to restore conjugal relations or enforce a divorce, he should be allowed to show that he had done all that was reasonably possible to maintain the marriage; whereas on the contrary if Defendant had acted mala fide and had in fact, as would appear to be the case here enticed the woman from her husband

designedly...../

designedly and had been the direct cause of the estrangement he is not entitled to protection in equity or in law.

We are of opinion that the judgment of the Native Commissioner should be set aside and the case returned for hearing on its merits.

It is accordingly ordered that the appeal be allowed with costs and that the judgment of the Native Commissioner be set aside and the case be remitted to be heard on its merits.

PINKERTON, Member, dissenting from the conclusion reached, states:

Whilst subscribing to the interpretation of Section 138 indicated in the judgment, I find it difficult to apply this ruling to the facts of this case which, according to the record, disclose that a definite breach had taken place and that the spouses were irreconcilable thereby showing, in my opinion, that they had ceased to live together within the meaning and intention of the Section.

For Appellant: Mr. M.W. Bennett of Vryheid.

For Respondent: Mr. Becker of Messrs Burchell & Becker of Pietermaritzburg.

1937 (T&N) 6.
1938 (") 60
1945 (") 35.

CASE NO. 31.

PENUWELI alias PENUEL KUMALO VS. MASHAMANDALA KUMALO.

PIETERMARITZBURG. 4th. November, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Jurisdiction conferred by consent of parties - Section 10 Act 38 of 1927 - Act 32 of 1917 - Rule 19, Native Appeal Court rules (G.N. 2254/1928) - Procedure - Irregularity in noting appeal - No order as to costs.

An appeal from the Court of Native Commissioner, Nqutu.

McLOUGHLIN, P. delivering judgment in the matter of an objection to the jurisdiction of the Native Commissioner's Court, states:

This is an appeal against the judgment of the Native Commissioner, Nqutu District, in a case in which the Plaintiff sought to recover from Defendant a sum of Eleven Pounds (£11) which he claimed to have handed to the latter's deceased brother Safile during 1918 at Johannesburg to be conveyed to his (Plaintiff's) father in his home District which commission was not carried out. The claim was brought against Defendant by reason of the fact he is the heir to his deceased brother.

According...../

According to the particulars in the summons and the evidence the Defendant is a resident of the District of Mahlabatini.

The summons commencing the action was issued by the Clerk of the Court, Mahlabatini, and the hearing of the case was commenced before the Native Commissioner of that District on the 16th. October, 1934, on which date the evidence of the Plaintiff, Defendant, and three of the former's witnesses was taken. The case was then adjourned until the 7th. November, 1934.

Before the hearing of the case could be resumed the Native Commissioner of Mahlabatini was transferred to the District of Nqutu.

The case was resumed on the 22nd. November, 1935, at Nqutu where the hearing was continued by the Native Commissioner who had presided at the preliminary proceedings at Mahlabatini and who pronounced the judgment now appealed against.

The only authority for the continuance of the hearing of the case by the Native Commissioner who had presided at the earlier sitting of the Court and who had meanwhile been transferred to the District of Nqutu, and the change of venue from Mahlabatini to Nqutu, is an order of Court made by the new incumbent of the Native Commissionership of Mahlabatini who with the consent of the parties to the action made the following order, viz:-

"Upon reading the application of the parties and "their consent to the transfer of the venue of this case:

"It is ordered

"That the venue of this case be transferred to "Nqutu and the case be concluded and judgment given by Mr. "H.P. Ashdown, formerly Assistant Native Commissioner of "Mahlabatini who has partly heard the case and is now Native "Commissioner at Nqutu. In terms of the consent the hearing "and judgment shall have the same effect as if the case had "been concluded and judgment given in the Court of the Native "Commissioner, Mahlabatini. There is no order as to costs on "this application."

Respondent objected to hearing the appeal owing to irregularity in the noting thereof.

As the objection itself did not comply with rule 19 of the Court it was overruled. The Court decided to hear the appeal and intimated that the matter would be dealt with when considering the question of costs or by reference to the Law Society if need be, as it was felt that it would impose hardship on the parties to refuse to hear the appeal owing to irregularity committed by their legal representatives.

Notice of a further ground of appeal was handed in at this stage when the Court was about to raise the very point suo motu, that in view of the decision of this Court in Koos Phaka vs. Alphius Mohali and another 1931 N.A.C. (T. & N.) p. 45, the parties could not by consent confer

jurisdiction...../

jurisdiction on the Native Commissioner of Nqutu to continue and complete the hearing of the case, and that in consequence the proceedings are irregular and should be quashed.

The Court in Koos' case abovementioned decided that "a Native Commissioner derives his jurisdiction as to persons and things from Section 10 of the Act (Act No. 38 of 1927) read with the proclamation prescribing the local limits within which he shall have jurisdiction."

Section 10(1) of the Act excludes specifically certain matters in which a Native Commissioner shall have no jurisdiction.

The Section does not indicate directly that jurisdiction in respect of persons is limited to residents within the area of jurisdiction, but in the proviso to Sub-section (3) it provides: "When the parties to any proceedings do not both reside in the same area of jurisdiction of any such Court the Court of Native Commissioner (if any) within whose area of jurisdiction Defendant resides shall have jurisdiction.in such proceedings."

It is contended by Counsel for Respondent that the statute, while specifically limiting jurisdiction in regard to special matters does not specifically exclude a right of submission by consent to its jurisdiction.

In interpreting this Section of the Act the Court is justified in referring to decisions of the Supreme Court based on similar provisions in other Acts.

Act 20 of 1856 (Cape) regulating Magistrates' Courts in the Cape prior to the passing of Act 32 of 1917, conferred civil jurisdiction on Magistrates in cases "brought or instituted against any person residing within the district for which such Resident Magistrate shall have been appointed."

That Act made no provision for submission to jurisdiction by consent similar to that now contained in Act 32 of 1917. The statutory provisions regarding jurisdiction are therefore identical with those of Act 38 of 1927.

In interpreting Act 20 of 1856 in the case of Oxland vs. Key (15 S.C. 315) De Villiers, C.J., held that

"A person cannot in the ordinary course be sued in the Court of a Magistrate in whose district he does not reside; but if he has expressly or tacitly submitted to the jurisdiction he cannot, in civil cases, at all events object to the exercise of such jurisdiction. Upon this point our practice is in accord with that of the Roman Law as well as that of the Dutch Law (See Voet 2.1.35; Vinnius de Jurisdic. 11.4. to 11)."

In the case of Clarke vs. Klossen, 1917 C.P.D. 77 Buchanan, J. remarked:-

"A distinction is drawn in the decided cases between want of jurisdiction in respect of the parties to a suit and want of jurisdiction in respect of the matter of the suit and it has also been repeatedly held that the statutory jurisdiction of Magistrates, as such, cannot be extended by the parties."

"But...../

"But in Oxland vs. Key (above quoted) the late Chief Justice has pointed out that a different practice prevails where the defect in jurisdiction arises from a personal privilege of the parties." He proceeds to quote the passage set out above.

As recently as 1925 in Smith vs. Petersen Ltd. (1925 C.P.D. p. 324) Van Zyl, J. remarked that "the principle laid down in Oxland vs. Key, had not been affected by the present Magistrates Courts Act (Act 32 of 1917)."

In the present case it was not contended that the partly heard case could not be removed to another district to be completed there by the judicial officer, who commenced the case, but was subsequently transferred.

Any objection to this practice is met by the reasons given in Voet Vol. I. Book II. Tit. 1, 181: "I know that there is a contract, as it were in judicio, that 'a lawsuit should be finished where it was begun' but this must not be taken in any other sense than that the plaintiff should not be able to transfer the suit to any other forum, without the consent of the defendant; and that without the consent of the plaintiff, the defendant should not desire it after the contestation of the suit, but as, with the consent of both, the judge could be departed from before whom the lawsuit was begun, and another judge be gone to to declare the law concerning the same cause not yet terminated by the sentence of the first judge, to do so is neither interdicted by the laws, nor do I think it foreign to the reason for the law."

In Oxland's case the Chief Justice remarked "What evidence is there, then of a prorogation of the Magistrate's jurisdiction in the present case? The plaintiff himself who now seeks to take advantage of the lack of jurisdiction, invoked that jurisdiction by suing the defendant in the court of a district in which the defendant was not residing. The defendant took no exception, and does not now object to the Magistrate's want of jurisdiction. Clearly then the jurisdiction was properly exercised and cannot now be objected to by the plaintiff.

"If the jurisdiction was properly exercised, the judgment stands on exactly the same footing as if both parties had resided in the district (Cf. Vinnius de Jurisdic. II. 127)."

In the present case the parties by written consent submitted their partly heard suit to the same officer who had partly heard their suit but had since been transferred to a new district. The circumstances are thus even stronger than those set out in the case of Hawulele Qoku vs. Zele Gcina 1935 N.A.C. (C. & O.P.D.) p. 74, wherein the Cape Division of the Native Appeal Court rejected the decision of this division in Koos Phaka vs. Elphius Mohali and Another (1930-31 N.A.C. (N. & T.) 45) for reasons based partly on the special provisions of Proclamation 145 of 1923 (the Transkeian Magistrates Courts Proclamation) and on the grounds incorporated in this judgment which appear to this Court to be conclusive, and which definitely refute the contentions on which the decision in Phaka's case was based.

While...../

While, however, overruling that decision this Court desires to intimate that as the decision affects purely native litigants it is imperative that the record in each case of this nature should disclose clearly that the parties, or rather the defendant, consents to the prorogued jurisdiction. The Court feels that injustice may accrue to an unrepresented litigant who may be unaware of his right to object to the assumption of such jurisdiction. Mere acquiescence will not necessarily be accepted by this Court as an indication of tacit consent by an unrepresented Native.

PINKERTON, Member, delivering judgment on the merits of the case:

The plaintiff claimed in the Native Commissioner's Court:

1. That in 1918 he handed to one Safile Kumalo, now deceased, the sum of £11 and that the latter undertook to hand over this money to Plaintiff's father which, however, he failed to do.

2. That in 1933 Defendant, in his capacity as heir of the late Safile delivered two head of cattle to Plaintiff and also promised a further two cattle to settle the liability of £11.

3. That thereafter Defendant repossessed himself of the two cattle and refused to restore them or to fulfill his promise to deliver the two other cattle mentioned, viz: a cow and a calf.

The plea to the summons is a general denial of liability.

The Native Commissioner gave judgment for Defendant with costs holding that he received no benefit from the estate of Safile and was therefore not liable to pay the debt. In support of his finding the Native Commissioner quotes the case of Msutu **vs.** Botela (17 N.L.R. 357.).

Against this judgment the Plaintiff appealed on the following grounds:-

1. That the marriage certificate put in was conclusive evidence that at the death of Safile a balance of eight head of lobolo cattle were due to Defendant as heir of Safile in respect of the marriage of Sipi.

2. That eight head of cattle were an asset in the estate of Safile which in law passed to the Defendant and vested in him.

It is not disputed that:

1. Plaintiff handed £11 to Safile for which he, Safile, failed to account.

2. That Defendant is the heir of Safile.

3...../

3. That certain eight cattle were due to Safile's estate as lobolo for Sipi at the time of Safile's death.

Mashesha Tange, the Chief's induna, stated that he inquired into the matter and Defendant said "Yes I have given you the cow with the white face but in regard to the black one I have not celebrated the marriage of my daughter. I will try and find another." There is no reason to doubt the evidence of the induna.

We have now to deal with the legal aspect as set out in the grounds of appeal.

Msimango Masondo who was called by Defendant stated that he married Sipe and paid dowry to Safile but that the marriage was not registered until after Safile's death and that eight head of cattle were due as lobolo at the time of Safile's death which should have gone to Defendant but that he, Msimango, set them off against a debt due to him by Safile's estate. There is no corroboration of this set off and not a tittle of evidence to show the amount and nature of the debt which is said to have been extinguished.

This Court cannot accept the unsupported evidence of Msimango that his liability exactly squared with an amount due to him by Safile's estate. Being unable to deny the truth of the reference in the marriage certificate to the unpaid balance of lobolo of eight cattle he seeks an ingenious way out of the difficulty to relieve both himself and Defendant from liability. The Defendant is however bound by Msimango's admission that at the time of Safile's death he still owed the estate eight lobolo cattle.

Whether the case falls to be decided under the Zululand Code of 1878 or the Natal Code of 1891 the position is the same in that Defendant has benefited from the estate to the extent of the claim.

It was the clear duty of the heir to collect outstanding assets due to the estate and his failure to do so does not free him from the obligation to liquidate the debts. This Court can come to no other finding than that the eight cattle were an asset in the estate and that Appellant is entitled to recover against the estate. The appeal is accordingly allowed and the judgment of the Native Commissioner altered to one for Plaintiff for £11 and costs in the lower Court. Normally the judgment would carry costs for Appellant, but in view of the irregularity complained of in the overruled objection the Court will mark its displeasure by making no order as to costs in this Court.

For Appellant: Mr. G. Masson of Pietermaritzburg.

For Respondent: Mr. M.W. Bennett of Vryheid.

CASE NO. 32.

1937 (T&N) 72.

NDHLAVELA NKOSI VS. BETSHU DHLAMINI & NYABELA NTEMBU.

PIETERMARITZBURG. 6th. November, 1936. Before A.G. McLoughlin, President, F.C. Pinkerton and W.G. Stafford, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Procedure - Invalid attachment on Writ of Execution - Demand necessary in terms of Rule 35 of Native Appeal Court rules (Proclamation 2254 of 21.12.28) - Debtor to be given opportunity of satisfying debt in manner most favourable to himself - Argumentative reasons for judgment deplored.

An appeal from the Court of Native Commissioner, Vryheid.

STAFFORD, Member, (delivering the judgment of the Court):

The Appellant was Plaintiff in the lower Court and sued for the return of a certain ox of which he alleged he had been wrongly deprived. He also claimed damages at 6d. per day for the period of his dispossession.

At the outset it must be noted that the rules of the Native Commissioner's Court have not been complied with as it is not stated that the claim was explained to the Defendant nor has Defendant's plea been recorded. Had this been done the issue between the parties would have been clear, and this Court would have been helped considerably.

After certain evidence had been lead the Native Commissioner asked Counsel what the position was and recorded certain facts. These presumably were agreed upon by Counsel. These facts show that:-

1. Defendant No. 1 had on 27/11/1935 obtained a judgment against present Appellant for one beast (without costs).

2. Three head were on 7/12/1935 attached on a writ of execution - of these two were released and the ox in dispute was handed to first Defendant.

3. Defendant No. 1 sold the ox to Defendant No. 2.

4. Thereafter on 7/1/1936, Appellant applied for and obtained an order against Defendant No. 1 restraining him from proceeding under the writ until he had paid costs in full and until demand had been made by first Defendant for the settlement of the judgment.

5. That when the order was made the Court was unaware of the fact that a beast had already been attached and handed to first Defendant.

6. About 1/3/1936 the beast was returned to Appellant.

7. On 9/3/1936 the Messenger again dispossessed the Appellant of this ox and handed it to first Defendant.

8. ...../

8. On 20/4/1936 first Defendant paid all the costs which he owed to Appellant. As no costs had been given on the judgment the reference to costs is not understood.

9. After payment of these costs Appellant issued his summons in the present action.

Appellant's contention is that as there had been no compliance with Rule 35 of the Native Commissioner's Rules the attachment was invalid and that he has a right of action and further that first Defendant has failed to comply with the order of 7/1/1936.

The Native Commissioner held on the facts disclosed that Appellant had no cause of action and dismissed the summons.

From this decision Appellant has appealed to this Court.

At the outset this Court is called upon to give an interpretation of Rule 35.

The Court interprets Rule 35 to be imperative and any failure to comply therewith literally invalidates any attachment.

The rule is not merely a rule of procedure affecting only the matter of costs but is one framed to meet the special conditions of Natives and native cases where the usual claim is one for stock or their value. It frequently happens that sentimental or religious value is attached to particular animals.

The opportunity should therefore be given the debtor to exercise his option of satisfying the debt in a manner most favourable to himself.

As the Native Commissioner has refused to proceed with the hearing in a misguided attempt at an equitable adjustment, the proceedings are grossly irregular and must be quashed.

It is therefore ordered that the proceedings in the Native Commissioner's Court be as they are hereby set aside with costs and the case is remitted for trial to a conclusion by another judicial officer.

The attention of the Native Commissioner who dealt with this case should be drawn to the fact that argumentative reasons in regard to the attitude of the Appellant in this case are to be deplored as it is the right of every person to approach the Court in any matter in which he has conceived his rights to have been infringed.

For Appellant: Mr. M.W. Bennett of Vryheid.

For Respondent: Mr. G. Masson of Pietermaritzburg.

CASE NO. 33. 1937 (T.N) 95, 126.

JOHN MOHLANKANA VS. ELIJAH MANYE.

PRETORIA. 18th. November, 1936. Before A.G. McLoughlin, President, R. Meaker and P.A. Linnington, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Adoption of child - Claim for maintenance - Demand places debtor in mora - Doctrine of enrichment - Traffic in children - Sections 7, 22, 28 and 31 of Children's Protection Act (No. 25 of 1923) - Procedure - Delay in noting appeal - Laxity in setting out grounds of appeal.

An appeal from the Court of Native Commissioner, Johannesburg.

McLOUGHLIN, P. (delivering the judgment of the Court):

In view of the importance of the issues raised in the case an application for condonation of a delay of one day in noting the appeal was allowed.

Plaintiff, now Respondent, sued Defendant, now Appellant, in the Native Commissioner's Court for £70.19.6. for the maintenance and care of his infant son from June, 1935 till May 15th. 1936.

He alleged that arrangement was made with Defendant's wife verbally that Plaintiff should have the custody and the bringing up of the said child as his own.

After hearing evidence the Native Commissioner gave judgment for Plaintiff for actual out of pocket expenses in connection with the child during the whole period in question amounting to £12.5.3.

It would appear from the evidence that Plaintiff is an elder of the Church. Defendant's wife gave birth to the child in June, 1935 and owing to friction between the Defendant and his wife the latter arranged with Plaintiff's wife to bring up the child. The mother died a week after its birth. After the funeral Plaintiff alleges he discussed the matter with Defendant. He avers that it was then arranged that the child would be left with him for good. Defendant alleges that it was agreed ten days after his wife's death that Plaintiff and his wife should look after the child until it could be fetched by his people in July, 1935. He alleges that no payment was then discussed - that in fact they offered to look after the child for him.

Plaintiff denies this arrangement. Pursuant to this arrangement, however, both Defendant and his mother-in-law allege that in July, 1935 demand was made for the child and that Plaintiff then refused to give it up. No discussion took place then about its maintenance.

Plaintiff alleges that demand was made in December, 1935 and that he then refused to hand back the child until

his...../

his claim for expenses had been paid. Only after action was instituted did he hand over the child in May, 1936.

The Native Commissioner held that Plaintiff had failed to substantiate an agreement alleged by Plaintiff to have been entered into by Defendant for the maintenance of the child. The Native Commissioner found definitely that the Defendant was never a party to the alleged agreement of adoption of the child. He proceeds to find that subsequent to the death of Defendant's wife, Defendant tacitly agreed with Plaintiff to maintain the child pending other arrangements.

Holding that it would be inequitable to allow Defendant to enrich himself at the expense of Plaintiff he gave judgment for the amount actually expended by Plaintiff. Defendant has appealed against the decision as being bad in law.

The Native Commissioner did not direct his attention to the Defendant's contention that he demanded delivery of the child in December, 1935. This has an important bearing on the case and will be dealt with later.

Two factors stand out in Plaintiff's evidence.

The first is that he intended to hold the child as his own although he admits it was never legally adopted. He admits that Defendant never consented to the alleged adoption at the instance of his wife.

Secondly he admits that he would never have made a claim against Defendant for upkeep of the child if Defendant had not reclaimed it. He adds that he would have looked to the child for recompense, regarding the child as his by adoption. In other words it is perfectly clear that he did not arrange for any payment by Defendant.

As against Plaintiff then his attitude in demanding payment vindictively affects what the Native Commissioner has regarded as the equitable aspect. Having refused to hand back the child when demanded by the Defendant in July or December, 1935 he placed himself *in mora* and thereby lost any claim in law or equity for further outlay on the child.

The enrichment doctrine on which the Native Commissioner relies is enunciated as follows: "No one shall be unjustly enriched at the expense of another x x x." - Hauman vs. Nortje, 1914 A.D. at page 298 and 301.

"The doctrine can only apply where the owner has taken some step to enrich himself by accepting the benefit of the work. He cannot be compelled to enrich himself and thus be deprived of the right of insisting on his contract." - Innes, C.J. in Ambrose & Aitkin vs. Johnson & Fletcher, (1917 A.D. at page 343).

It is apparent that Plaintiff cannot succeed in claiming on the ground of equity more than what he expended up to the time the child was demanded in July, 1935 - a sum of £1.4.10. or £6.2.3. as at the end of December, 1935.

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The matter does not rest here, however, for the Court is bound to look deeper into the case on the authority of the decision in Cape General Dairy vs. Sim, 1924 A.D. 167 and take notice of prohibitory legislation affecting the claim.

Whatever motive actuated Plaintiff in accepting custody and care of the child - he himself denies that it was humanitarian - the Plaintiff gives the impression that it was purely utilitarian, that is that he was adopting the child to be ultimately recompensed by his services.

This may not border on actual slavery but the law does not allow any traffic in children - it savours of slavery and there is a danger to the life and/or interests of the child, especially an infant.

The law requires firstly in the case of all children up to sixteen years of age that where a child is adopted by some one that the act be done with due formality and consent before a Magistrate and special penalties are provided by the Act (No. 25 of 1923 (Section 7)) making it an offence for the adopting parent to give or receive any premium or other consideration in respect of such adoption.

Section 22 of the Children's Protection Act, 1913, requires that any person who retains or receives any infant for the purpose of nursing or maintaning such infant apart from its parents for a longer period than three days shall within 48 hours after so retaining or receiving such infant x x x transmit notice in writing to the Magistrate of the district x x x .

Sections 28 and 31 make it an offence punishable by fine of £100 or imprisonment for six months to fail to give such notice.

The Section (28) directs that in addition to any other penalty, the offender shall be liable to forfeit any sum of money received by him for nursing or maintaining any infant x x x .

Relatives as defined by the Act are exempted from the operation of these sections.

It is not conclusively established by the evidence that the Plaintiff or his wife are or are not relatives of the Defendant within the meaning of the Act, but there is indication in Plaintiff's evidence under cross-examination that this relationship is probably non-existent in which event the prohibition of the Act would invalidate the Plaintiff's claim unless it can be shown that the prescribed steps had been taken by Plaintiff in accordance with the Act.

If relationship be not established and if no reports have been made judgment must necessarily be for Defendant with costs in the Native Commissioner's Court.

If, however, the Plaintiff does not fall under the prohibition of the Act he would be entitled to reimbursement of out of pocket expenses up to the time he was placed <u>in mora</u> with costs in the Native Commissioner's Court.

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In order to elucidate these matters it will be necessary to set aside the judgment of the Native Commissioner and to return the record for further evidence to be taken regarding the question of relationship and the making or failure to make report as required by the Act when it can be ascertained if Plaintiff is precluded by the Act from claiming or not.

It is ordered that the appeal be as it hereby is allowed and that the judgment of the Native Commissioner be as it hereby is set aside and the case returned for hearing by the Native Commissioner of such further evidence as may be tendered by either party and for a new decision on the whole case. On the question of costs in this Court the Appellant, by reason of his default in noting the appeal, will not be given costs in this Court.

Accordingly no order will be made as to costs in this Court.

The Court is constrained to draw attention to the vague and irregular manner in which the grounds of appeal are set out in this case. -

"1. That the judgment is bad in law and contrary to law.

"2. That the judgment is against the evidence and against the weight of evidence.

"3. That the judgment is contrary to law and not in accordance with Native Custom."

Grounds of appeal must be carefully drawn and set out in detail. The objects to be served by such grounds of appeal are -

(1) To enable the magistrate to frame his reasons;

(2) to inform the respondent of the case he is to meet;

(3) to notify the Appeal Court of the points to be raised;

and

(4) to give the respondent an opportunity of abandoning the judgment.

The Court will, in future, not tolerate laxity in this respect.

For Appellant: Mr. J.B. Herman.

For Respondent: Mr. I. Cooper.

CASE NO. 34.

CASE NO. 34.

REV. BENEDICT PITSO VS. ALBERT SCHUTA.

PRETORIA. 19th. November, 1936. Before A.G. McLoughlin, President, R. Meaker and P.A. Linnington, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Building contract - Proof of agreement made verbally and reduced to writing as evidence - Agency.

An appeal from the Court of the Native Commissioner, Pretoria.

McLOUGHLIN, P. (delivering the judgment of the Court):

This is an appeal against the decision of the Native Commissioner awarding the Plaintiff, now Respondent, a sum of £31 with costs.

Plaintiff claimed a sum of £50 less £19 paid on account alleging that he and Defendant had entered into a verbal agreement to build a church and house for £585 and that in connection therewith Defendant agreed to pay in instalments, as a deposit, the sum claimed.

Defendant excepted to the summons as disclosing no ground of action but this was overruled by the Native Commissioner and has not been questioned on appeal. He then pleaded denial of the contract or alternatively that if the Court find a contract had been proved, that the Defendant acted as agent for his congregation of the Bantu Catholic Church, a voluntary association.

The Native Commissioner found for Plaintiff that
(a) there was a verbal contract;
(b) that the amount was due as a deposit.

On judgment being given for Plaintiff the Defendant appealed on the ground that the Native Commissioner had erred in holding there was a contract and alternatively, that if an agreement be established by the evidence, that it was between Plaintiff and the Congregation and that Defendant acted as agent of the Congregation.

The evidence is somewhat conflicting but it appears that discussions took place regarding the contract; that the parties proceeded to an attorney to have their facts placed on record as evidence and that subsequently work was commenced and that Plaintiff was paid a portion of the amount stipulated as a deposit.

Apparently Plaintiff did not attend to the work to the full satisfaction of Defendant who thereupon complained to the C.I.D. and refused to make further payments.

On the evidence the Court finds that there was a verbal contract between the parties.

Defendant himself states that "The agreement was that Plaintiff was to build the Church and house for £585. The deposit was to be £50" and he details certain conditions under which the instalments became due.

There...../

There is no evidence on record to show that it was a condition of the agreement that its terms should be reduced to writing and that there was to be no binding contract until so reduced to writing.

Plaintiff does say that writing was desired as evidence.

The parties apparently went to an attorney for this purpose and there settled all material conditions of the contract.

An agreement was not signed, however, as there were certain minor details in regard to specification to be decided.

On the other hand the actions of the parties show that their negotiations did result in an agreement which both parties put into execution. Plaintiff on his part did certain work on the contract and Defendant on his side paid certain sums thereon. Defendant's evidence bears out this view. -

"Plaintiff was paid £19 and he commenced to build "the Church. He was paid no more as he refused to work. Had he continued working he would have been paid more. He took on other work and ceased working on my work. x x x He was not engaged to build only the foundations. x x x we expected Plaintiff to complete his work as he had agreed to do so."

Whatever delay ensued, if any, and whatever remedy Defendant has against Plaintiff therefor, the fact is clearly established that a contract was entered into and put into force.

The facts are very similar to those set out in the case of Wood vs. Walters, 1921 A.D. p. 305 which is directly in point. In that case it was laid down that "the broad rule is that writing is not essential to the validity of a contract; the consensus of the parties need not be so evidenced. There are certain definite exceptions to that rule but none which affect the present dispute.

The parties may of course agree that their contract shall not be binding until reduced to writing and signed, and if they so agree there will be no vinculum between them until that has been done.

But the mention of a written document during the negotiations will be assumed to have been made with a view to convenience of record and facility of proof of the verbal agreement come to, unless it is clear that the parties meant that the writing should constitute the contract.

It follows of course that where the parties are shown to have been ad idem as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it." - at pages 305 and 306.

Counsel...../

Counsel for Appellant referred to the case of C.K. Bazaars vs. Bloch, 1929 W.L.D. p. 37 and urged that as certain minor details in the specification had not been finally settled there could be no contract. That case is distinguishable on the ground there that the parties contemplated the drawing of a formal contract and the verbal preliminaries were held by the Court to fall short of a binding contract. In the present case the Court takes the view that the verbal agreement was the main agreement of the parties and that any subsequent written record was merely evidence thereof. The facts are, as already indicated, more nearly on par with those in the case of Wood vs. Walters above quoted.

On consideration of all the facts and the law applicable this Court comes to the conclusion that the Native Commissioner was correct in his finding on this point.

The second ground of appeal is disposed of by Defendant's own evidence. While contending that he was not principal but agent, he admits "I also spoke to Plaintiff on behalf of the congregation." Other passages of the evidence belie his contention that he was agent. Plaintiff is emphatic that he negotiated only with Defendant as principal and not as agent. His witness Kraut corroborates him although he hedged considerably in giving a clear cut reply; but he finally stated to the Court "I clearly understood that the Rev. Pitso (Defendant) was himself to be responsible for the undertaking."

Whatever doubt may exist as to the truth of this statement is dispelled by Defendant himself. He alleges that he (Defendant) made the payments to Plaintiff and adds "I would have had to pay the money and get it from the congregation." He adds "He (Plaintiff) took on other work and he ceased working on my work. I in consequence went to the C.I.D."

Defendant relies for his contention that he acted as agent on a document marked "C" purporting to be a memorandum dictated by Plaintiff as his version of the agreement wherein the Church Congregation is mentioned as the other contracting party. Plaintiff repudiates the use of these words and Defendant himself states that "the agreement 'C' was entirely departed from", i.e. in the subsequent agreement which became final. It is true that the document bears the date 14th. June and would thus be of later date than the meeting before the attorney but it came from Defendant's possession after the dispute had arisen and it is not substantiated by any other evidence. Neither the writer nor any member of the congregation has been called to corroborate it and it bears internal evidence which tend to confirm Plaintiff's allegation that it was executed at an early stage in the preliminary negotiations.

The Court in these circumstances feels that it cannout, on this piece of evidence alone - in face of the other admissions, conclusions and probabilities in the evidence - set aside the finding of the Native Commissioner that the contract was with Defendant as principal and not as agent.

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The appeal will accordingly be dismissed with costs.

For Appellant: Mr. L. Perkins of Messrs De Villiers & Pickard, Pretoria.

For Respondent: Mr. J.C. Bosman, Pretoria.

CASE NO. 55.

RUFUS MABYANE TSCKE VS. CHIEF HAZEEL ZWARTBOOI MATHIBE.

PRETORIA. 20th. November, 1936. Before A.G. McLoughlin, President, R. Menker and P.J. Linnington, Members of the Court (Natal and Transvaal Provinces).

NATIVE APPEAL CASES - Secretary to tribal Chief - Remuneration - Customary gifts - Practice - Evidence where credibility equal, onus decides - Probabilities consonant with custom.

An appeal from the Court of Native Commissioner, Hamanskraal.

McLOUGHLIN, P. (delivering the judgment of the Court):

In this action the Plaintiff sued Defendant for a sum of £26 in respect of salary for a period extending from 1st. November, 1931 to 28th. February, 1936. Also for another sum amounting to £3.3.6. as and for money lent and goods sold to the Defendant.

The Native Commissioner gave judgment for the Defendant on both claims. He states in his reasons for judgment that there was nothing in the demeanour of the parties or the manner in which they gave evidence to guide the Court but he considered that the probabilities in the case favoured the Defendant whom he therefore believed as against the Plaintiff.

The Court is asked by the Counsel for Appellant to hold that the Native Commissioner has erred on the facts in holding that the services of Plaintiff were rendered gratuitously or he should have given a judgment of absolution from the instance and that further he has misconceived the aspect of the relationship existing between the Plaintiff and Defendant.

The facts briefly are that during the period in question Plaintiff rendered clerical service in dealing with tribal matters at the Defendant's place, he being a tribal chief. That during that period sundry mutual transactions in money and goods took place between the parties but no fixed payments were made regularly to Plaintiff. In February, 1936 the arrangement was terminated for reasons not clearly disclosed but apparently owing to some lapse on the part of Plaintiff which is, however, immaterial to the issue.

Plaintiff...../

Plaintiff alleges that on 22nd. February, 1935 he addressed a letter "A" to the Chief in which he states "Chief as it is now some time I have been waiting for my pay for the period I have worked I think it is only right that I should be paid and that this amount of 10/- should henceforth be paid to me monthly. x x x .

The Defendant denies receipt of this letter but admits that of another written on 19.1.36 in the same strain.

The Defendant denied liability and after discussion in the lekgotla where Plaintiff maintained that he had to be paid he was told to proceed to action.

No just cause has been shown to this Court to disturb the finding of the Native Commissioner on either claim.

As in regard to the first claim for payment of salary the evidence does not support the Plaintiff 's case.

He admits that he and others had worked for the Chief. He states that he does not know whether they were paid or not. Defendant on contrary says definitely that they were not paid and this assertion is corroborated indirectly by the evidence of Daniel and by the letter of the 22nd. February, 1935 which conveys an impression that he then first raised the question of payment. -

"I think it is only right that I should be paid and that the amount of 10/- should henceforth be paid to me monthly."

Plaintiff's version is uncorroborated and is inconclusive.

Not only is this the case but there is nothing in Native custom which conflicts with this view. It is common practice in all Native tribes to render service to a tribal chief and to expect nothing in remuneration except sporadic gifts and commission which may come the way of the servitor.

Similarly it is universal Bantu custom for Chiefs to receive gifts in money and in kind from members of the tribe especially those in funds.

It is indeed regarded as an honour to serve the tribe in a position of authority e.g., on the lekgotla, without specific salary.

It is for Plaintiff to establish clearly that there has been a departure from custom in his case. This he has failed to do. Indeed the evidence as presented by Defendant is consonant with custom and the more probable.

Counsel for Appellant asks the Court to disturb the Native Commissioner because he admits that in regard to demeanour he could not discriminate between the parties in the matter of credibility and Counsel refers this Court to the decision in the case of Forbes vs. Golach, 1917 A.D. 559.

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That case however does not support him for the decision is based on a special set of facts and it laysdown merely the rule that if the Court is unable to decide on which side the truth lay its only course is to grant absolution on the ground that Plaintiff has failed to establish his case.

The decision in the case of Estate Kaluza vs. Braener, 1926 A.D. 256 goes further and indicates that where both credibility and probabilities are equal the Court must fall back on the element of onus.

Now in the present case it has already been indicated that the Native Commissioner found definitely that though there was equality in the manner of demeanour he nevertheless found that the probabilities favoured the Defendant.

This Court agrees with the finding for the reasons given above.

Not only has Plaintiff failed to discharge his onus but the evidence supports the finding in favour of the Defendant.

The case is based on two separate claims but the evidence and the reasons set out apply equally to both claims.

In the circumstances the appeal will be dismissed with costs.

For Appellant: Advocate de Wet instructed by Messrs Stegmann, Costhuizen & Jackson of Pretoria.

For Respondent: Advocate J.A. Rainier instructed by Messrs Adams & Adams of Pretoria.

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